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# NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

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## MBA PROFESSIONAL REPORT

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### Procurement Fraud Case Studies

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**By:** James R. S. Gayton  
June 2004

**Advisors:** Ron Tudor  
Jeffrey D. Cuskey

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**CASE STUDIES IN GOVERNMENT PROCUREMENT FRAUD**

James R. S. Gayton  
Lieutenant Commander, United States Navy

Submitted in partial fulfillment of the requirements for the degree of

**MASTER OF BUSINESS ADMINISTRATION**

from the

**NAVAL POSTGRADUATE SCHOOL  
June 2004**

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# **PROCUREMENT FRAUD CASE**

## **ABSTRACT**

The purpose of this research is to provide guidance that will increase awareness and facilitate class discussions on ethical situations that contracting officers are exposed to during their business relationships with contracting firms. The cases explore the specifics of individual incidents of ethical and procedural procurement violations. Additionally, this study provides conclusions and recommendations to educate prospective contracting officers on the temptations and legal ramifications of procurement fraud within their commands.



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I would like to thank God, my wife and daughter, and family for their unwavering support. I would also like to thank Professor Ron Tudor and Professor Jeff Cuskey for their guidance and support

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## **EXECUTIVE SUMMARY**

Contracting Officers are often placed in situations that test their ethical and moral compass. The job requires the Contracting Officer to have access to significant monetary resources, which are highly sought after by those in the private industry. Some Contracting Officers and private industry employees resort to illegal actions in hopes of gaining some sort of competitive advantage over other competitors or to make extra money for their own private gain. This research illustrates specific case studies, in which procurement fraud was committed, in an effort to educate Contracting Officers on the many ways in which procurement fraud can be committed, and to show the legal ramifications.



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## **I. INTRODUCTION**

### **A. BACKGROUND**

Government Contracting Officers are stewards of the taxpayer's money and are entrusted to maintain the highest ethical standards and to ensure that the money spent buys the best-value products and services for the use and protection of the taxpayers. The inherent nature of the job requires the contracting officer to have access to vast amounts of resources (funds) that are highly sought after by the civilian community. Furthermore, by virtue of the position of the contracting officer, he/she can make decisions that largely affect the personal wealth and prosperity of a contractor. It is because of this power that the contracting officer can be subjected to various offers from the contractor that may or may not present ethical dilemmas. Because of the awesome responsibility and authority of the contracting officer, he/she must maintain a professional perception, be of resolute character, and avoid any situations that might create an appearance of impropriety.

A Code Of Ethics was established when the House passed concurrent resolution number 175 on July 11, 1958. It applies to all government employees and office holders. The code was set into Public Law in July 3, 1980. The Code of Ethics reads as follows:

Any person in Government service should:

I. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

II. Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.

III. Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.

IV. Seek to find and employ more efficient and economical ways of getting tasks accomplished.

V. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept,

for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.

VI. Make no private promises of any kind binding upon the duties of office, since a Governmental employee has no private word which can be binding on public duty.

VII. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

VIII. Never use any information gained confidentially in the performance of governmental duties as a means of making a private profit.

IX. Expose corruption wherever discovered.

X. Uphold these principles, ever conscious that public office is a public trust.<sup>1</sup> (<http://www.houstonprogressive.org/ethics.html>)

Fraud is the deliberate use of deception to gain some sort of advantage. There are six types of procurement fraud that classify various activities by government contracting officers and private contractors alike. The six activities are as follows:

**1. Defective Product/Product Substitution**

This refers to instances in which the contractors knowingly deliver products to the Government that do not meet contract requirements, yet, the Government is not informed of the defect by the contractor.

**2. Defective Testing**

Defective testing refers to instances in which the contractor fails to perform contractually required tests or when they do not test the product in a manner agreed upon within the terms of the contract.

**3. Bid-Rigging**

Bid rigging can be accomplished on both the government side and the private contracting side or with some illegal cooperation between the two. It involves an agreement to limit competitive sources to the Government. When bid rigging occurs, the Government usually pays a much higher price for the product or service because of a lack of true competition. When found to exist, the damages awarded for bid rigging are the difference between what the Government actually paid on the fraudulent claim and what it would have paid if there had been fair and open competitive bidding.

#### **4. Bribery and Public Corruption**

This involves the breach of a Government employee's duty of loyalty to the taxpayer for personal gain.

#### **5. Defective Pricing**

Defecting pricing refers to when a contractor has certified that their anticipated costs are current, accurate and complete as per the specific terms under the Truth in Negotiations Act. When their costs are not within their certified specifications, they are guilty of defective pricing.

#### **6. False Invoices**

False invoices occur when contractors knowingly submit invoices for products or services not delivered, or when the full invoice is knowingly submitted after the terms of the contract have not been fulfilled.

As previously indicated, when fraud is committed, taxpayers lose. To protect the taxpayer against fraud, the Government created a number of policies. The Department of Justice (DOJ) policy requires the coordination of parallel criminal, civil, and administrative proceedings with the ultimate goal to obtain favorable results in cases involving procurement fraud. The Department of Defense (DOD) policy likewise requires the coordinated use of criminal, civil, and administrative proceedings but also allows for contractual remedies. The DOD policy also requires each department to establish a centralized organization to monitor all significant fraud and corruption cases. "Significant" refers to all cases that involve bribery, gratuities, or conflicts of interest and there is no minimum amount of money that classifies it as a "significant" case. A significant case also involves investigations into defective products or product substitutions where there is a serious hazard to health, safety, or operational readiness is impaired (regardless of loss in value). Each centralized organization monitors all significant cases to ensure the proper procedures are invoked in a timely manner.

## **B. STATUTES**

Those that commit procurement fraud in its various forms are subject to various criminal statutes. There are eight different criminal statutes that may apply.

### **1. Conspiracy to Defraud**

18 U.S.C. § 286 (with claims) and 18 U.S.C. § 371 (in general) refer to the knowing agreement by two or more persons to commit a criminal offense or to defraud the Government. It also covers the intentional and actual participation in the conspiracy, and the performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal.

### **2. False Claims**

18 U.S.C. § 287 includes the proof of a claim for money or property, which is false, fictitious, or fraudulent and material. False claims are made or presented to a department or agency of the United States when they are submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. It is of no consequence to prosecution under section 287 that the claim was not paid.

### **3. False Statements**

18 U.S.C. § 1001 covers when the defendant makes a statement or submits a false entry. “Statement” has been interpreted to include oral and un-sworn statements. The Government also must prove that a statement was “material.” The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. Therefore, the statement must concern a matter within the jurisdiction of a federal department or agency. Finally, “intent” must also be an element of a false statement conviction. Intent is defined as the intent to deprive someone of something by means of deceit and in the context of a false statement; it must be knowingly made and willfully submitted.

### **4. Mail Fraud and Wire Fraud**

18 U.S.C. §§ 1341-43 concerns the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are purposely broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes. Because the elements of mail and wire fraud are similar, the cases

interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. The precedents include the formation of a scheme and artifice to defraud and the use of either the mails or interstate wire transmissions in furtherance of the scheme.

## **5. Major Fraud Act**

The establishment of 18 U.S.C. § 1031, created a new criminal offense of “major fraud” against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines for their violations. The elements of violating the Act are knowingly engaging in any scheme with intent to defraud the U.S., or to obtain money by false or fraudulent pretenses on a U.S. contract valued at \$1,000,000 or more. The maximum confinement is ten years, and the fines are determined on a sliding scale based on certain aggravating factors. For example, a basic offense is \$1,000,000 per count. A governmental loss or contractor gain of \$500,000 or more is \$5,000,000 minimum. The conscious or reckless risk of serious personal injury is \$5,000,000 and multiple counts are \$10,000,000 per prosecution.

## **6. The Procurement Integrity Act**

49 U.S.C. § 423 restricts the disclosure of contractor bid and proposal information. The Act further stipulates that if a person is found in violation of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract, they shall be imprisoned for not more than five years or fined as provided under title 18, United States Code, or both. However, the Attorney General may instead bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of the Act. If the evidence proves a violation, the person is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation, which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation, which the organization received or offered for the prohibited conduct.

## **7. Conflicts of Interest. 18 U.S.C. § 208**

This refers to areas of financial conflicts of interests. It prohibits an employee from participating personally and substantially in his or her official capacity in any particular matter in which he or she has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions apply in three separate situations: 1) an employee may not work on an assignment that will affect the employee's financial interests, or the financial interests of the employee's spouse or minor child; 2) an employee may not work on assignment that will affect the financial interests of a partner or organization where the employee serves as an officer, director, employee, general partner or trustee; and 3) an employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.

## **8. The Civil False Claims Act**

31 USC § 3729-33 (1988) is the primary litigation weapon for combating fraud. The purpose is to target corporations, companies, associations, partnerships, and individuals who knowingly present, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval. It also aims to protect against those that conspire to defraud the Government by having a false or fraudulent claim allowed or paid. Those entities who knowingly make, use, or cause to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States are also prosecutable under this Act. The civil penalty is between \$5000 and \$10,000 per false claim and there is no requirement for the United States to prove that it suffered any damages. The Government also does not have to show that it made any payments pursuant to false claims. There was a case in 1989 (United States v. Halper, 490 U.S. 435) in which the defendant faced aggregated penalties of \$130,000 for false claims, which had damaged the Government in the amount of only \$585.

## **9. REMEDIES**

Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Those contractors that participate in procurement fraud, obviously, are not responsible.

### ***a. Debarment and Suspension***

These are two separate administrative remedies for contractors that violate ethical practices in the Government, yet, as per the Federal Acquisition Regulation (FAR), Part 9.103(a): FAR 9.402, they shall not be used as punishment. A suspension is an action taken by a suspending official to disqualify a contractor temporarily from Government contracting. A debarment, however, is an action taken by a debarring official to exclude a contractor from Government contracting for a specified period. Some obvious causes for debarment are committing fraud or a criminal offense in connection with a contract, embezzlement and receiving stolen property. However, companies that engage in unfair trade practices and those that put “Made in America” labels on those that are actually non-American goods are also subjected to debarment. The amount of time a contractor is debarred depends on relevant findings as to the appropriateness of the length of the debarment. For example, a contractor with violations of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 1481, may be debarred for five years while a suspension may not exceed 18 months unless legal proceedings are initiated within that period.

### ***b. Withhold Payment***

When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that particular contract will be withheld unless directed otherwise. In fact, it is the duty of administrative, accounting, and auditing officials of the Government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States to which there is a reasonable suspicion of irregularity, collusion, or fraud. In turn, this reserves the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and forfeiture declared or other appropriate action taken.



*c. Default*

Another remedy available to the Government in cases of procurement fraud is to place the entire contract in default based on fraudulent proceedings. Some common grounds for default terminations are submitting falsified reports, submitting forged performance and payment bonds, and submitting falsified progress payments requests. A Federal agency will consider rescinding a contract upon receiving information that a contractor has engaged in illegal conduct concerning the formation of a contract, or there has been a final conviction for any violation of 18 U.S.C. §§ 201-224.

**C. DEFINITIONS**

Financial Interests. Defined as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c)(1). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

Personally. Defined as direct participation, or direct and active supervision of a subordinate.

Substantially. Defined as an employee's involvement that is significant to the matter.

Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters.

Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest.

**D. CONFLICT OF INTERESTS-9 KEY CONCEPTS**

**1. Key Concept 1**

The conflict-of-interest statute, 18 U.S.C.S. § 208(a), is violated when an officer or employee of the executive branch of the United States Government participates personally and substantially as a Government officer or employee, through decision,

approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a contract, claim, controversy, or other particular matter in which, to his knowledge, he has a financial interest.

## **2. Key Concept 2**

A Government agent can violate the conflict-of-interest statute by entering a relationship, which makes it difficult for him to represent the Government with the singleness of purpose required by the statute.

## **3. Key Concept 3**

Nothing indicates, or even suggests, that a criminal conviction is necessary before enforcement of a contract tainted by a conflict of interest may be denied.

## **4. Key Concept 4**

It is the potential for injuring the public interest created by a conflict of interest that requires invalidation of the tainted contract. It therefore is immaterial whether the particular taint has or has not in fact caused the Government any financial loss or damages.

## **5. Key Concept 5**

What the conflict-of-interest statute condemns is the inevitable taint of the contract itself that results when it is the product of a conflict of interest. Tainted contracts are disaffirmed because of the breach of the agent's duty toward those he has undertaken to represent and not because of the quantum of damage to the one or the amount of benefit to the other.

## **6. Key Concept 6**

Whatever may be the appropriateness of allowing recovery where the government has received benefits under the tainted contract; recovery is not permissible where the firm seeking recovery itself was involved in the corruption of the government official.

## **7. Key Concept 7**

Effective implementation of the conflict-of-interest law requires that once a contractor is shown to have been a participant in a corrupt arrangement, he cannot receive or retain any of the amounts payable there under.

## **8. Key Concept 8**

There logically should be no difference in ultimate consequence between the case where a contractor has been paid under an illegal contract and the one in which payment has not yet been made.

## **9. Key Concept 9**

Once corruption is proven, all financial considerations, such as damage to one party or benefit to the other, are irrelevant to the Government's right to disavow the contract. The same principle also requires refund of amounts paid under the tainted contracts and the question of whether the government suffered pecuniary loss from the contracts similarly is irrelevant.

## **E. RESEARCH QUESTIONS**

- What are some specific examples in which procurement fraud was committed?
- What specific actions were violations of the procurement process within these examples?
- What lessons learned can be drawn from these situations that all contracting officers can benefit from?

## **F. METHODOLOGY**

Except for the Colonel Moran case, background information was obtained by researching the media references. An investigating Officer was contacted regarding the Colonel Moran case but he could only refer to previously published media articles because of the sensitivity of the on-going investigation. It will be approximately two more years before further information is available under the Freedom Of Information Act. The Druyun case is also on going and the lawyer has declined comment to the press, and Darleen Druyun has erased her phone listing from the Vienna, VA telephone listings after pleading guilty to the conspiracy charge. She is scheduled for sentencing in August of 2004.

## **II. CASE STUDIES**

### **A. DRUYUN CASE STUDY**

Darleen A. Druyun, age 56, of Vienna, Virginia rose to the rank as the second highest acquisition officer in the Air Force as a Senior Executive Service (SES) government employee. Her stellar thirty-three years of service included various positions in the Air Force, the Office of Management and Budget (OMB) and the National Aeronautical and Space Administration (NASA). In 1991, she served as the Assistant Administrator for Procurement and Acquisition for NASA. She served as NASA's Chief of Staff from 1992 until 1993 where she was responsible for the daily management of the agency. [Ref. 7]

She became the Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management from 1993 until she retired in November 2002. While serving in this billet, she supervised, directed, and oversaw the management of various acquisition programs within the Air Force. Her duty while serving in the billet required that she provide advice on acquisition matters to the Assistant Secretary of the Air Force for Acquisitions, the Chief of Staff of the Air Force, and the Secretary of the Air Force. She also chaired the Acquisition Professional Development Council, which was directly responsible for recruiting and training military and civilian personnel within the acquisition community. Druyun additionally served as chairperson of the NATO Airborne Early Warning and Control Program Management Board of Directors, which was chartered by the North Atlantic Council to manage the multi-billion dollar NATO E-3A AWACS program. This program was funded by twelve nations. [Ref. 7]

Druyun built a reputation for riding contractors who fell behind schedule or went over budget. She did so in a cold, abrupt, humorless style according to several industry officials and former Air Force officials who worked for her. "I have never seen her not be a fierce advocate for the Air Force", said Jim McAleese, who is a defense industry lawyer who has negotiated with her. [Ref. 5] Other defense contractors describe her as a

“formidable opponent, one of the most powerful women in the Pentagon and someone who could cripple a cherished program with a scornful eye. Her nickname, they say, was “Dragon Lady”. [Ref. 5]

### **1. Back-Scratching**

It can be assumed from the available evidence that a request from Heather Druyun motivated Darleen A. Druyun to contact Michael Sears, Boeings’ Chief Financial Officer, to get Heathers’ boyfriend, Michael McKee, a job at Boeing. Darleen Druyun had professional dealings with Sears for a number of years. After Darleen Druyun contacted Sears, he immediately contacted Michael McKee who was subsequently hired. Michael McKee began working for Boeing in September of 2000. Darleen Druyun later contacted Sears again - this time to assist her daughter, then a recent college graduate, in finding a job. [Ref. 7] Heather Druyun began employment at Boeing in November of 2000 working in a position created specifically for her, as a college recruiter for Boeing. (Heather Druyun then married Michael McKee.)

Darleen was also directly involved in the negotiations with the Boeing Company in 2002 to lease 100 KC 767A tanker aircraft for the use of the Air Force. The total value of the contract was estimated to be worth \$20 billion dollars. According to an October 27 *Washington Post* article, Boeing executives met with Darleen Druyun, on September 25, 2001, to discuss how the company could sell the tankers even though the Air Force did not have the funds to cover the deal. [Ref. 1]

According to notes taken by Boeing, Druyun agreed not only to promote the leasing idea on Capitol Hill but also to find needed money by cutting back a comparatively inexpensive modernization program for existing tankers—“an arrangement, Boeing and the Air Force have acknowledged, that will retire flight worthy tankers early to procure new ones,” [Ref. 2]. This was the strategy in spite of the fact that a report by the General Accounting Office, the investigative arm of Congress, cast doubt about the need for new tanker planes, arguing that the current fleet of KC-135s had plenty of life left. [Ref. 4]

If Darleen Druyun could broker the deal between the Air Force, Capitol Hill, and Boeing, Boeing would win the estimated \$20 billion contract and recover completely

from the financial crisis promulgated by 9/11. After 9/11 commercial airlines had all but stopped buying airplanes from Boeing. To help win over Congress, Druyun is quoted as saying, “work placement could help” [promote the deal], meaning that Boeing should ensure that subcontracts were awarded in the districts of key Congressional members, according to Boeing notes obtained by Congressional subpoena. [Ref. 2] An email obtained from Bob Gower, Boeing’s vice president for tankers, wrote: “[The] meeting today on price was very good. Darleen spent most of the time bringing the [US Air Force] price up to our number... It was a good day!” [Ref. 4]

On September 3<sup>rd</sup> of 2002, while her mother was still a government employee with the Air Force, Heather McKee sent an E-mail over the Boeing Company intranet to Sears. The subject line read, “Please do not forward...RE: Darleen Druyun”. Although Heather McKee did not personally know the senior executive, she was aware of who the senior executive was and of the professional relationship between Sears and her mother. Heather McKee encouraged Sears to pursue her mother for a position at Boeing and advised the senior executive that her mom had not publicly announced her upcoming retirement. Also she informed Sears that her mother was interviewing with Lockheed Martin. [Ref. 7]

An excerpt from Sears’ response is provided below:

...I met with your mom last week. She informed me of her plans, and I suggested that she and I chat. She said she needed to wait until she got some of our work completed before she should chat with me. Did I miss a signal or have the wrong picture?

Records show that Heather McKee responded minutes later:

Oh! I think she is referring to the tanker deal – might be too much of a conflict right now. She hopes to have the tanker deal made or scrapped by early Dec- seems like a long time off, maybe she has to wait that long before approaching us. It still makes me very worried that she is talking to Lockheed! She is visiting me tomorrow for a couple days... I hope that I can get a better understanding then... she is also talking to Raytheon and L3 (formerly E-systems, I think?) Anyway, we need to talk to her...[Ref. 7]

## **2. ...When First We Practice to Deceive**

On October 5, 2002, Sears called Druyun to schedule a meeting to continue the employment discussions. They decided to meet in Orlando, Florida on October 17, 2002 where Druyun was attending a National Defense Industrial Association Conference and a NATO-AWACS conference. Sears arrived by way of a private aircraft and met with Druyun for about thirty minutes. Druyun told Sears that she already had a “handshake agreement” to work for Lockheed Martin. However, Sears and Druyun managed to negotiate a salary of \$250,000 and a signing bonus of \$50,000. [Ref.3] They also discussed other issues involving the employment, including the specifics of the starting date and when and where the formal offer of employment should be sent. Sears was aware that Druyun had not disqualified herself from Boeing matters due to her position in the Air Force, so at the end of the meeting he told her, “This meeting really didn’t take place.” [Ref. 7]

The next day, October 18, 2002, Sears sent other executives at Boeing an email regarding Druyun although he did not reference Druyun by name. The email read as follows:

Howdy. Had a “non-meeting” yesterday re: hiring Jim Evatt’s deputy. Good reception to job, location, salary, longer-term outlook. Recommend we put together a formal offer:

\*Job as we discussed

\*Location defined as we discussed

\*Salary \$250 K (assuming that fits)

\*Recruitment bonus \$50K (important dimension of offer: could get by with \$40K)

\*Start date 3 Jan 03 (and immediately travel to Desert meeting)

FedEx offer to home for 14 Nov arrival...[Ref. 7]

On October 22, 2002, clearly after the negotiations for employment took place, Druyun actively participated in a meeting at the Pentagon with Air Force staff and an official of the Office of Management and Budget (OMB) regarding the terms and

conditions of the KC 767A tanker program and the price the Air Force would pay for the Boeing aircraft. It was not until November 5, 2002 that Druyun finally submitted a letter to the Air Force stating that it was her plan to enter into employment discussions with Boeing and was disqualifying herself from any matters involving Boeing. [Ref. 7] The notice made no mention of the previous employment negotiations.

Druyun retired in November of 2002 and she sold her house in the Dunn Loring area of Fairfax County for \$50,000 below the original asking price to “Mr. John Judy”, who happened to be a Boeing lawyer. [Ref. 5] Druyun began working for Boeing on January 2, 2003. In the summer of 2003, press reports questioned the KC 767A contract and the hiring of Druyun by Boeing. Druyun was scheduled for an interview by Boeing’s counsel on July 7, 2003 regarding the investigation of the circumstances in which Boeing hired her. [Ref. 7]

Druyun tried unsuccessfully to reach Sears by phone regarding the upcoming interview. So on July 4<sup>th</sup>, 2003 she emailed him in an attempt to ensure that their versions were congruent. In other words, she wanted to ensure that they would be on the same sheet of music even though it was not factual. In the email, when she recounted her fictitious version and sequence of events, saying that she disqualified herself and then began talks of possible employment with Boeing after November 5th, is when Sears responded that her version is as “precisely as I can recall” the meeting. This alerted her that he would stick to her version of the story. When she was questioned by outside counsel for Boeing on July 7, 2003, she lied and claimed that her first employment discussions occurred with Boeing on November 5, 2002 and she said nothing of her October 17, 2002 meeting with Sears. [Ref. 7]

In August of 2003, it was brought to her attention that emails had been obtained that conflicted with the story that she and Sears had given and that she was to be re-interviewed. She informed Sears of this, who in turn urged her to “hang tough” and stick to the fictitious version of the story. [Ref. 7]

### **3. Boeing...What Say You?**

Meanwhile, spokesmen for Boeing admitted no wrong doing to members of the press who questioned the relationship. A Boeing spokesman told the Washington Post



that Druyun, “did not influence her daughter’s hiring at the company”. Druyun’s lawyer in early October 2003 told the Washington Post that she had disclosed any possible conflicts of interest ahead of time and that his client did nothing wrong.

By mid October, however, Druyun’s attorney sent a letter to the Inspector General of the Department of Defense saying that she will “...look forward to cooperating with your investigation.” In subsequent interviews with “outside counsel for Boeing on November 11 and 17, 2003”, she admitted to lying in the July 7, 2003 interview and she revealed the plan to maintain the false story with Sears. Boeing fired Druyun and Michael Sears on November 24, 2003. Druyun pleaded guilty April 20, 2004 to conspiracy in the U.S. District Court and is scheduled for sentencing on August 6, 2004 for violating Federal conflict-of-interest rules -- overseeing the negotiations of the lease from Boeing while at the same time negotiating prospective employment with a senior executive of Boeing. She faces a maximum of five years in prison and a \$250,000 fine.

As of this report, Boeing has a dilemma of what to do with Heather McKee, Druyun’s twenty-seven year old daughter. As part of her plea deal, prosecutors have agreed not to prosecute Druyun’s daughter, and Boeing cites privacy concerns as to why they will not discuss their plans. Ken Boehm, chairman of the National Legal and Policy Center, says that Heather McKee can be viewed as an un-indicted co-conspirator while referring to her role in engaging Boeing in a bidding war for her mother. “I would fire her in a second. She is the center point for the unethical conduct between her mother and Mike Sears”, said Keith Ashdown, a defense expert with Taxpayers for Common Sense. [Ref. 6]

#### **4. A One Time Incident or First Time Getting Nabbed?**

For those that feel that Druyun may be the victim and that she simply wanted to help her daughter (and get a good job for herself after retiring), are forgetting that Druyun was well versed in the Government’s conflict of interest regulations. Also, Boeing’s competitor, the European Aeronautic Defense and Space Company (EADS) or, more specifically, its Airbus subsidiary that manufactures A330 aircraft, was in contention for the huge contract. [Ref. 4] E-mail messages have been discovered by members of

Congress that suggest Druyun may have shared confidential financial details of the Airbus offer with Boeing, thus giving the U.S. company a competitive advantage in crafting its own proposal.

Darleen repeatedly came at us on price throughout the discussion,” stated one e-mail written in April 2002 by Andrew Ellis, a Boeing representative in Washington. “Darleen told us several times to keep in mind that EADS proposed price on green A330 was USD5-USD17M (five-17 million dollars) cheaper than green 767. [Ref. 4]

During the early 1990’s she claimed herself the title, “Godmother of the C-17”- a program designed to produce a plane for carrying heavy equipment around the world. However, the program was running behind schedule and was over budget while McDonnell Douglas, the prime contractor was under financial pressure. Many Air Force officials believed that McDonnell Douglas’ crisis would translate into troubles for the C-17 program. A 1993 report by the Pentagon’s Inspector General accused Druyun and four other Air Force officials of secretly funneling \$349 million to McDonnell to keep the contractor solvent and in turn keep the C-17 program on track. Although she was cleared during that probe, Les Aspin (Secretary of Defense at the time) later fired a general associated with the program, which indicates that he saw a need for some reconciliation for the questionable ethical acts. [Ref. 5]

## **B. MISSISSIPPI VALLEY**

The Druyun case study is not revolutionary in terms of legal precedence. In fact, a conflict of interest case similar to the Druyun case can be found as early as 1953 during the Eisenhower administration. The Mississippi Valley case comes from the Supreme Court of the United States and is the seminal case in conflicts of interest. The facts of the case are quite complicated and lengthy. However, a full recitation of the facts is necessary for complete understanding. During President Eisenhower’s first State of the Union Message on February 2, 1953, he unveiled his plan to encourage local communities or private companies to provide power in cooperation with the Federal Government. The Director of the Bureau of the Budget, Joseph M. Dodge, eliminated a request for funds from the Tennessee Valley Authority (TVA) for the construction of a steam-generating plant at Fulton, Tennessee. The plant was supposed to serve as

industrial, commercial, and domestic power needs of the City of Memphis. When the General Manager of TVA, Gordon Clapp, learned of Dodge's decision, he informed the people working in the Bureau of the Budget that if the proposed plant was scrapped, the amount of power supplied to the Atomic Energy Commission (AEC) by TVA should be reduced to meet increasing demands of the other TVA customers. The Bureau of the Budget then began to draft a statement to be included in the President's budget message that would effectively relieve some of TVA's commitments to the AEC, and if that did not work, then the decision to scrap the plant would be reconsidered. [Ref. 18]

Dodge met with Lewis Strauss, Chairman of the AEC, and with Walter Williams, General Manager of the AEC on December 2, 1953. He said that he thought the AEC should research the possibility of reducing its use of TVA-generated power by contracting with private industry for the construction of a plant that would supply 450,000 KW of additional power for the AEC at its Paducah, Kentucky installation by 1957. Dodge's goal was to avoid further expenditures by TVA for the construction of power-generating plants. When Dodge asked Williams if the plan and time-line was feasible, Williams replied that he could not answer appropriately until he had consulted with the President of Electric Energy, Inc. J. W. McAfee. McAfee ran the private utility company that had previously entered into similar long-term power contracts with the AEC.

On December 2, 1953, Dodge met in his office with Lewis I. Strauss, Chairman of the AEC, and Walter J. Williams, General Manager of the AEC. Dodge said that he hoped to avoid further expenditures by TVA for the construction of power-generating plants, and that he thought the AEC should investigate the possibility of reducing its consumption of TVA-generated power by contracting with private industry for the construction of a plant that would supply 450,000 KW of additional power for the AEC at its Paducah, Kentucky, installation by 1957. Dodge inquired whether the plan outlined by him would be feasible, and Williams replied that he could not answer the question until he had consulted with J. W. McAfee, the President of Electric Energy, Inc., a private utility company, which had previously entered into long term power contracts with the AEC similar to the one Dodge was describing.

Williams and McAfee arranged to meet on December 8, 1953 and during this meeting, Williams asked McAfee if he knew of a private power company that might be interested in building a power plant to supply the AEC with 450,000 KW by the middle of 1957 as outlined by Dodge. McAfee said it would be difficult but he would do some investigating on the subject. McAfee then wrote a letter to the AEC on December 14, 1953, saying that he believed that a group of investors could be formed to supply the AEC with the needed amount of power. A copy of McAfee's letter was sent to the Assistant Director for Budget Review in the Bureau, William F McCandless because of the Budget Bureau's interest in the progress of the plan.

Edgar H. Dixon, President of Middle South Utilities, had learned from McAfee that the AEC might be looking for an additional source of power in the Paducah area. He learned this sometime before December 14, 1953. Dixon went to Strauss' office on December 23, 1953 for a meeting to discuss the possibility of having private utility companies build additional generating capacity near Paducah in an effort to relieve TVA of its commitments to the AEC there. The meeting was with Williams, Straus, and Kenneth Nichols. Nichols was selected to succeed Williams as the General Manager of the AEC. The Assistant Director of the Bureau of the Budget, Rowland Hughes, wrote to Strauss on December 24, 1953 that it would be helpful if the AEC would continue negotiations with private power companies in hopes of reaching a firm agreement to supply power to the AEC at Paducah.

The purpose of the meeting was to discuss the possibility of having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to the AEC there. Shortly after the meeting had concluded, Williams called McCandless at the Bureau of the Budget to inform him of what had transpired at the meeting. On the next day, December 24, 1953, Rowland Hughes, Assistant Director of the Bureau of the Budget, wrote to Strauss, stating that it would be helpful if the AEC would continue negotiations with private power interests with a view toward reaching a firm agreement for the supply of power to the AEC in the Paducah area.

After the Christmas break on January 4 1954, McAfee wrote a letter to Williams telling Williams of the doubts McAfee had in the Government's plan. McAfee believed it would be more feasible for TVA to reduce its commitments to the other municipalities it supplied power to. Williams received this letter when he was on the way to a meeting in Strauss' office with Strauss, Nichols, Hughes, Williams and McCandless attending the meeting. Nichols pointed out that if the AEC bought more power from private utilities instead of continuing with power already being supplied by TVA, the cost to the AEC would be more and would be less stable because of delays in the construction of the plant and the location of the reserve power. He also let it be known that McAfee was no longer as eager to enter into the contract from an engineering perspective; Paducah was a bad location for the site of the new plant. He also said that it would be better for the City of Memphis or for TVA to enter into a contract with private contractors for the construction of the plant at that location if more power was needed in the Memphis area. McCandless asked that the AEC work with McAfee to further discuss the matter.

McAfee, Dixon and representatives for the Budget Bureau and for the AEC met on January 20, 1954. Dixon and McAfee understood that the purpose of the power plant was to relieve the power demands of TVA in the Memphis area by reducing its commitments to the AEC and the possibility of constructing the plant at Memphis instead of at Paducah was brought up. Dixon said that it might be better for TVA to act as the contracting agency instead of AEC since the power would be supplied directly to TVA. The government representatives, on the other hand, preferred that the AEC contract for and pay for the power even though TVA would still deliver the power. Dixon then agreed to perform a cost benefit analysis of the factors pertaining to his company constructing the power plant to supply power in the Memphis area for 450,000 to 600,000 KW of power.

McAfee lost interest when it became obvious that the new plant was to be located in Memphis. This is because Memphis was located too far from the list of companies he was interested in so he decided to draft his own proposal. He did this, however, while

maintaining a close relationship with several government officials and with Adolphe H. Wenzell, the Vice President and Director of First Boston Corporation, which was one of the major financial institutions in the country at the time.

Dixon met with the Chairman of the Board of the Southern Company, which was a public utility holding company, on February 19, 1954 to convince Yates that Southern should join his Middle South Company in building the proposed power plant. Yates notified Hughes on February 20, 1954 at the Bureau of the Budget and Nichols at the AEC that the Southern Company had decided to join in the venture the next day.

Dixon and Yates submitted their proposal to the AEC on February 25, 1954 and offered to form "MVG" which would construct and finance facilities to deliver 600,000 KW of electrical power to TVA in the Memphis area for the account of the AEC. The Government decided that the cost estimates contained in the proposal were too high after conducting a comprehensive joint analysis by TVA and the AEC. The analysis also showed that the proposal would cost over seven million dollars more each year than what the TVA plant in Fulton would cost. Dixon and Yates requested that the Chief of the Bureau of Power, Federal Power Commission, Francis Adam make another analysis, in which he confirmed the findings saying that the proposal was much higher than reasonable costs require.

It was apparent by March 24, 1954 that the Government would not accept the Dixon and Yates proposal so they drafted a proposal, which was more palatable and submitted it to the AEC on April 12, 1954. The fact-findings do not specifically indicate where the second proposal was different from the first yet the proposal was more appealing to the Government. Hughes sent Eisenhower a memo reporting the findings and recommending that the Budget Bureau be authorized to instruct the AEC to conclude a final agreement. The President then authorized AEC to continue with negotiations in an attempt to finalize an agreement based on the terms of the second proposal on June 16, 1954. The contract became effective on December 17, 1954.

Dixon and Yates learned after they had taken some preliminary efforts towards contract performance (June 1955) that the President had asked the Bureau of the Budget,

TVA, and AEC to consider terminating the contract because the City of Memphis had decided to construct a municipal power plant in the interim. This circumvented the need in that area for TVA to supply power. On July 11, 1955 President Eisenhower decided to terminate the contract and Dixon and Yates were notified of this decision by the Chairman of the AEC. After congressional debate over the propriety of Wenzell's activities on behalf of the Budget Bureau, the counsel decided that the contract was not an obligation that the Government could recognize. Dixon and Yates then filed suit for damages. The fact pattern presented above does not, on its face, present a straight forward, compelling case for procurement fraud. It must be analyzed in detail to understand the fraud implications.

### **1. What Did Wenzell Do? How Was Wenzell Involved?**

Back in May of 1953, the Chairman of First Boston, George Woods, met with Dodge from the Bureau of the Budget and told Woods that he agreed with the Administration's stance for letting private firms partner with the Government, thus, reducing Government's participation in business. He offered his firm's services as a way to help achieve the Administration's objective. Dodge told Woods that he was looking for the right person to conduct studies on the amount of subsidy that TVA was receiving from the Government. Woods referred Wenzell to Dodge as the man who would be best qualified to do the work because he had worked on many utility financing transactions. Wenzell was a vice president of First Boston at the time and also one of its directors. Wenzell had been with the firm since its inception in 1934 and with the firms' predecessor since 1923. He owned stock in First Boston under his wife's name.

When Woods told Wenzell of the job, Wenzell agreed to take it. No other executive from First Boston objected. Wenzell agreed to serve as a part-time consultant to the Bureau where he was to spend a maximum of two days a week in Washington until completion of the project. Wenzell also agreed to receive no compensation from the Government except for \$10 a day for food and transportation expenses. He would maintain his position with First Boston and continue to receive his regular salary and bonuses based on business that he brought to the firm.

Wenzell began working for the Bureau on May 20, 1953 and submitted his final report on September 20, 1953. Wenzell was shown a lot of confidential data during his four months with the Government, while performing the financial analysis of TVA. His report contained many unsolicited recommendations saying that the future demands for power in areas supplied by TVA should be met by a municipal power plant or another private company rather than by expanding TVA's facilities. Even though Wenzell was warned of the confidential nature of his report by the Government and told by Dodge not show it to anyone, Wenzell showed a copy to Woods.

In January 1954, after McAfee and Dixon began their preliminary negotiations as previously described, Dodge and Hughes had asked Wenzell to go to Washington to discuss the possibility of working with the Bureau on a part-time basis to assist with the negotiations with Dixon. When they met, Hughes told Wenzell that the Government planned to arrange for a privately owned power plant near Memphis and also told him of the plan to explore negotiation potential between McAfee and Dixon. Wenzell's job was to act as a technical consultant for costs regarding any financing that would have to be used for the contract. He still maintained his current job with First Boston. Wenzell told Hughes that he knew Dixon and McAfee, and that he had previously talked to Dixon regarding services that First Boston proposed to perform for one of Dixon's companies. Hughes then requested that Wenzell attend an upcoming meeting with AEC, McAfee and Dixon and asked that he influence them towards prompt action.

Wenzell attended the meeting on January 20<sup>th</sup> and although he was the only representative of the Budget Bureau at the meeting, he also brought along Paul Miller, who was an assistant in First Boston's buying department. Dixon said that he would begin investigating the feasibility of the types of contracts desired by the Government and Wenzell would talk with a man named Tony Seal from an engineering firm name Ebasco which serviced Dixon's projects.

Before Wenzell returned to New York following the meeting, Hughes asked Wenzell to keep in touch with Dixon regarding the development of the proposal and the real cost used in financing the project. Wenzell told Seal what occurred in the Washington meeting and told Seal to begin a study of the proposed project. He also told



Seal that he would help Seal any way he could as a representative of the Bureau of the Budget on the subject of interest on money that would have to be borrowed to finance the construction of the plant.

Wenzell traveled back to Washington to inform Hughes of what had happened with the meeting with Seal. At Washington, Wenzell met up with Dixon and the two men flew together back to New York. Dixon asked Wenzell during the flight to find out what First Boston's position was in terms of the money market interest rates for financing a similar project. Wenzell met with the other executives in First Boston to research this and then called Dixon to report his findings. He gave Dixon the revised figures in February 14, 1954.

When McAfee lost interest because of the proposed site location of the new plant, Dixon looked for another potential partner and found one in Yates. Dixon then arranged for a meeting with Yates and Wenzell on February 19, 1954. Wenzell and Yates had known each other for several years. As written previously, Dixon and Yates decided to work together the next day.

On February 23, 1954, Wenzell drafted a letter to Dixon giving his opinion as to the cost of money. The information in this letter was the same as Wenzell had given on February 14, 1954. The letter was signed by Wenzell in his role as an officer of First Boston and even written on First Boston stationery. On February 25, 1954, Dixon and Yates submitted their first proposal. The proposal contained only one reference to the cost of money, and that paragraph read as follows:

We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation.  
[364 U.S. 520, 538]

The "responsible financial specialists" was of course, Wenzell and his colleagues at First Boston, and the cost data that they conditioned their proposal on was from the opinion letter drafted by Wenzell.

Although Wenzell did not participate in the initial study of the Dixon and Yates proposal, he did attend a staff meeting held on March 1<sup>st</sup> by the Budget Bureau to review the proposal and he brought with him to the meeting an assistant vice president of First Boston' sales department, Powell Robinson. By this time (March 1<sup>st</sup>), Wenzell had completed his duty as a consultant on the cost of money and was now in the role of consultant on the project in terms of total cost. Wenzell also called Seal from New York when Wenzell could not answer the technical engineering questions related to costs. When Seal arrived the next day, however, he was unable to answer all the questions raised from the staff members. Hughes recognized the uncertainty and suggested that a joint AEC and TVA analysis be made. Wenzell immediately informed Seal of this.

Wenzell did not participate in the initial study of the sponsors' proposal, but on March 1, 1954, he attended a Budget Bureau staff meeting which had been called for the purpose of completing the review of the proposal. Wenzell brought with him to this meeting Powell Robinson, an assistant vice president of First Boston's sales department. Wenzell, who by March 1 had completed his function as a consultant on the cost of money, now assumed the role of a consultant on the total cost of the project. His initial reaction was that the cost estimates contained in the first proposal were too high. When it became apparent that Wenzell could not answer all of the technical questions relating to engineering costs, Wenzell decided to call Seal down from New York. Seal arrived on the following day and the meeting was continued. As it turned out, Seal was also unable to answer all the questions asked by staff members, and Hughes was advised that, despite Wenzell's insight into the problem, there still remained areas of uncertainty. It was then suggested by a staff member that a joint AEC-TVA analysis be made. Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made.

When the decision that the cost estimates were too high became apparent, Wenzell told Seal that to tell Dixon and Yates they needed another proposal that would be viewed as more acceptable. On March 10, 1954 Wenzell arranged a meeting with the Chairman of First Boston's Executive Committee Duncan Linsley, Dixon, and Yates. The purpose of the meeting was for Dixon to confirm from a reliable source that the cost-of-money figures previously given by Wenzell were correct. The last time Wenzell went

to Washington while acting in his capacity as a consultant to the Bureau was April 3, 1954, yet Dixon and Yates continued to consult him while preparing their second proposal, which was submitted April 12, 1954. The second proposal contained a paragraph stating that Dixon and Yates relied on Wenzell's advice.

The Court of Claims made it perfectly clear that the conflict-of-interest question in the case arose many months prior to the time that the Government concluded that the contract was unenforceable. In fact, those who first showed concern about the duality of Wenzell's interests were Dixon and Yates. Dixon's counsel, Daniel James, expressed apprehension about the fact that Wenzell was an officer of First Boston and was also an employee of the Budget Bureau. As a result of his discussion with James, Dixon later spoke to Wenzell about the "embarrassment" that might result if First Boston were to be retained as financial agent. Dixon suggested that Wenzell talk to his superiors at the Budget Bureau about the situation. On February 23, 1954, Wenzell followed Dixon's advice and spoke to Hughes about the matter of duality. Wenzell alluded to the fact that he had given Dixon and Yates an opinion letter on the probable cost of money for financing the project, and that First Boston was the source of the information given to Dixon and Yates. Wenzell then pointed out to Hughes that if it later developed that First Boston was to be asked to handle the financing for Dixon and Yates, the fact that he had been the instrument for obtaining the interest figure from First Boston, had given the figure to Dixon and Yates, that it could be charged that he, as a First Boston officer, and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston. Hughes replied that he thought Wenzell was exaggerating the problem, but he nevertheless advised Wenzell to discuss the matter with his associates at First Boston, with his counsel, and ultimately with Dodge.

On February 26, 1954, Wenzell met with John Raben, another member of the law firm who generally handled First Boston's business, and described the activities in which he had engaged on behalf of the Budget Bureau. Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. During the days that followed, Wenzell, in conversation, recognized the danger of his

dual position, but he did not resign, as he had been advised to do. On March 9, 1954, Wenzell spoke to Dodge about his problem. Court records show that Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible.

Despite the fact that Wenzell had earlier promised to inform Dodge of any agreements between First Boston and the sponsors and to submit those agreements to the Budget Bureau for approval, and despite the fact that First Boston's counsel had advised Wenzell to inform the Budget Bureau of any such agreements, neither Wenzell nor anyone connected with First Boston informed the Budget Bureau of First Boston's retention by Dixon and Yates. The Bureau of the Budget did not learn of First Boston's retention until February 18, 1955. There was no evidence that any representative of AEC had knowledge up to . . . [December 1954] that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to Dixon and Yates regarding the project.

## **2. Conclusion**

The contract was held by the Supreme Court to be unenforceable because of the conflict of interest by the parties. The Court stated, “the primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. It is this inherent difficulty in detecting corruption, which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. Therefore, even if the result in a given case may seem harsh, and we do not think that such is the case here, that result is dictated by the public policy manifested by the statute. We agree with Judge Jones' statement that the policy so clearly expressed in 18 U.S.C. 434 leaves no room for equitable considerations . . . If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions.”

### C. COLONEL MORAN CASE STUDY



Figure 1. Pictured from left to right. Joseph Kang Hur(left), Col Richard Moran(center), and Gina Moran(right)

Colonel Richard J Moran was the commander of the U.S. Army, Contracting Command Korea (USA-CCK). USA-CCK had the responsibility for the solicitation, award and oversight of contracts entered into by the United States Armed Forces in the Republic of Korea. As Commander of USA-CCK, he supervised a staff of over 140 people and was responsible for the oversight, the approval, and the execution of more than 17,000 defense contracts worth more than \$310 million annually. These contracts ranged from obtaining security services on the base to barracks construction. [Ref. 15]

Colonel Moran was an ambitious man who had risen from the ranks of an enlisted soldier to an officer via Officer Candidate School. Throughout his career as an officer, he received training in contract law, contract and price analysis, negotiations, and finally earned his Masters' Degree. His determination ensured that he rose through the ranks to become the Officer in Charge in USA-CCK, one of the most powerful commands in the Army's Acquisition Corps. He attained this position within his twenty-five years of military service. Besides these career highlights, and the fact that he married his second wife, Gina Cha Moran, a Korean woman, very little is known about him. [Ref. 12]

Colonel Moran spent most of his career stationed between Hawaii and Korea. Some people that knew him described him as "amiable", as long as you did not work for him. Others described him as keeping an "arms' length" distance from other people. According to a Judge Advocate General that used to work for Moran at USA-CCK, "He was in a lot of respects, a high-maintenance commander. If you ever said 'no' to him, even in a respectful way, he would interpret it as disrespectful ... He was not somebody who encouraged the people who worked for him to get to know him well." [Ref 12] Colonel Moran exhibited some unusual actions for a man in his position that could easily be written off as personality quirks. For example, he carefully screened the new incoming personnel that were scheduled to arrive in his command, but only for certain positions. He appeared to show surprising interest as to the background of those that were slated to relieve certain positions within the command. He would personally intervene in instances where some "hot runners" would request to be stationed at the command, citing that he did not want to lose the corporate knowledge by rotating proven performers out of the command. There were times when he would personally insist on

reviewing and reconciling the seemingly mundane administrative paperwork within the command. Repeatedly, he would ask for and receive follow-on orders to the same command and other commands in Korea. With his direct leadership style and successful career record, the Army easily complied with his requests, as most other senior Officers were not as willing to serving in a less desirable location like Korea as Moran had been. Most other senior Officers were in the twilight of their careers when they reached Morans' seniority and rank and would rather finish their careers in a CONUS geographic area that allowed for an easier transition to civilian life or retirement. That is why there was very little competition from other senior Officers to compete for the jobs that he wanted.

### **1. Aulson and Sky Contracts**

Kyu Chun Chong was president of Aulson and Sky Construction Company, Ltd ("A&S") a construction company based in the Republic of Korea. A&S had submitted a bid for a contract to improve military family housing at the Osan Air Base in the Republic of Korea in March of 2001. Specifications of the "Military Family Housing Contract" stated that the contract should be awarded to the lowest priced, technically acceptable offer that satisfied the terms and conditions of the solicitation. The Government had estimated that the contract was valued at \$1.9 million. A total of sixteen companies submitted bids for the Military Family Housing Contract. A&S was ranked eleventh out of sixteen based on its proposed price but was ranked second for those considered to be technically acceptable by USA-CCK. USA-CCK conducted a further assessment and awarded the Military Family Housing Contract to A&S. [Ref. 15]

In May 2001, A&S had submitted a bid on the "Camp Carroll Contract", a contract designed to upgrade and renovate barracks at Camp Carroll. As is common with most construction contracts, USA-CCK had specified that the contract should be awarded to the lowest priced, technically acceptable offeror that satisfied the terms and conditions of the solicitation. Of the seventeen companies that submitted bids for the Camp Carroll Contract, A&S was ranked 15<sup>th</sup> for the price they proposed and then later ranked second among those thought to be "technically acceptable" by USA-CCK. A&S once again won the contract after further assessment by USA-CCK. [Ref. 15]

In August of 2001, A&S submitted a bid for the “Area 1 Contract”, which was a comprehensive barracks upgrade and renovation project in Korea, estimated to be worth \$16.3 million. Of the ten companies that submitted bids for the Area 1 Contract, A&S ranked next to last for its proposed price (it was \$1.6 million more expensive than the lowest bidder) and subsequently ranked third among the technically acceptable by the command. USA-CCK awarded the Area 1 Contract to A&S after conducting a further assessment. [Ref. 15] It is at this point that an anonymous call was placed to the Criminal Investigative Division (CID) to report on some “irregularities” in the conduct of Moran regarding the Yongsan Barracks in Seoul.

The call had originated the biggest white-collar crime investigations that the Division had ever been involved in. By the fall of 2001, a twelve-member task force was established to exclusively monitor and track Moran. The local investigation evolved into a global investigation with more than 700 leads with agents from CID working with other investigative and staff agencies, such as: the Assistant Secretary of the Army for Acquisition, Logistics and Technology; the Army Audit Agency; the Air Force Office of Special Investigations; the Korean National Police and the Seoul’s prosecutors office; the Internal Revenue Service; and the FBI. [Ref. 12]

## **2. IBS Industries Company Contract**

Woong-Seo Koo was the Chief Executive Officer and Chairman of IBS Industries Company, Ltd (IBS) a company based in the Republic of Korea. In September 2001, IBS bid on the “Security Guard Contract” an estimated \$112 million contract for uniformed civilian security guards throughout the Republic of Korea. IBS had employed Joseph K Hur as a consultant for the purpose of obtaining the Security Guard Contract. USA-CCK had specified that the contract should be awarded to the offeror that provided “best value” to the Government and that satisfied the terms and conditions of the solicitation. Eleven companies submitted bids for the Security Guard Contract and IBS was ranked 8<sup>th</sup> for its price and then ranked 2<sup>nd</sup> among those deemed to be technically acceptable by USA-CCK. USA-CCK awarded a portion of the Security Guard Contract to IBS. [Ref. 15]



### **3. An Unexpected Visit**

By January of 2002, investigators had compiled what they believed was enough information to formally charge Colonel Moran. They compiled two teams of CID agents consisting of twelve members for each team. The team members synchronized their watches and at 0700 on January 16, 2002, both teams accosted the Morans - one team approached Colonel Moran at his office and the other rang the doorbell at his home to perform a search. The goal was to surprise him so that he would not have time to hide any evidence. [Ref. 12]

Gina Moran answered the door and allowed the investigators inside after they identified themselves. As she sat on the sofa in the living room across from an investigator, who was to ensure that she would not interfere with the investigation, the investigators began a search of her bedroom. After the search in the bedroom did not find anything incriminating, they moved to other parts of the house. It was at this time that Gina Moran informed the investigator that monitored her that she was not feeling well and excused herself to the bathroom. [Ref. 15] Once she was out of view of the agents, she would stuff bundles of cash under the mattress that was already searched in her bedroom. She then would return to the sofa in the living room and sit for awhile, say she was ill and excuse herself again. She repeated this conduct a number of times. [Ref. 12]

She was very skillfully removing handfuls of the \$700,000 in cash bundles from the sofa that she was sitting on. Somehow, without notice from the agent that was “monitoring” her, she was grabbing a handful of cash that was located between the cushions and placing it under the mattress of the bedroom that was already searched. She did this every time she excused herself. [Ref. 12]

After Colonel Moran was escorted back to his residence with some of the other team members, he and his wife sat on the sofa as the search continued. The money was eventually discovered under the mattress. It was in \$10,000 bundles. The search of their residence lasted until 0400 the next day. They also found \$20,000 in \$100 bills in a cabinet in the kitchen dining room area. [Ref. 12]

#### **4. Cashing In On Inside Information**

Colonel Moran, his wife Gina, and Joseph Hur were charged with conspiracy, accepting bribes, and obstruction of justice. Colonel Moran was charged with receiving bribes from Korean companies, either personally or through the use of his wife Gina and Joseph Hur, in an effort to secure the award of contracts to the Korean companies.

##### ***a. A&S***

In February 2001, Colonel Moran secured an agreement from A&S to be paid 150 million Korean Won for the award of the Military Family Housing Contract. Kyu Chun Chong of A&S paid 50 million Korean Won to an unindicted co-conspirator who was recruited by Colonel Moran for the purpose of getting details of the confidential Independent Government Cost Estimate to A&S to assist A&S in its bid for the Military Family Housing Contract. [Ref. 15]

In May of 2001, Gina Moran met with Kyu Chun Chong of A&S and agreed to an additional payment of \$50,000 in exchange for ensuring that A&S would win the Military Family Housing Contract. She received that money in \$100 denominations at the Yongsan Army base in September 2001. [Ref. 15]

After receiving the two lowest bids received on the Camp Carroll Contract in June 2001, Moran noticed that A&S was not the lowest bidder. He informed Kyu Chun Chong that A&S would have to submit a Best and Final Offer. After being awarded the Camp Carroll contract, Gina Moran arranged for Kyu Chun Chong to pay \$200,000 in \$100 bill denominations. They received the money in July for the Camp Carroll contract. [Ref. 15]

Colonel Moran gave his wife details of the Government's Independent Government Cost Estimate for the Area 1 contract in August 2001. She met with Kyu Chun Chong and agreed to receive \$500,000 in exchange for the award of the Area 1 contract. After all companies submitted their bids to USA-CCK Colonel Moran took possession of the price negotiation memorandum, which detailed how another company (not A&S) should receive the contract. Colonel Moran then directed his subordinate to collect the files for the Area 1 contract including the bids submitted by all participating contractors, in order to perform a different analysis of the cost and pricing data submitted

by the technically acceptable contractors. The following month, Colonel Moran informed his employees working at USA-CCK that the other contractors who submitted bids lower than A&S were not “appropriate for the award of the contract”, which left A&S as the lowest priced, technically acceptable contractor for the Area 1 contract. Gina Moran collected installment payments from Kyu Chun Chong from late November to early December totaling \$150,000 in \$100 bill denominations for ensuring A&S that they were awarded the Area 1 contract. [Ref. 15]

***b. IBS***

In regards to the Security Guard contract, Colonel Moran met with Joseph Hur, the consultant for IBS that was hired to assist in obtaining the contract in August 2001. The meeting ended in both of them agreeing that Moran would assist Hur in securing the award of the Security Guard contract for IBS, provided that Hur said nothing of their agreement to anyone. Once IBS received the contract or a portion of the contract, Hur and Moran would split the bribe money. After being awarded the contract in September, Woong-Seo Koo of IBS paid \$20,000 in \$100 bill notes and Korean Won bank checks to Joseph Hur. In October, Hur split the money and bank checks with Colonel Moran. Colonel Moran later felt he needed more compensation for his part in ensuring that IBS got the contract so he instructed Hur to seek more money from IBS for the portion of the Security Guard Contract. [Ref. 15] Hur complied and met with Woong-Seo Koo. Hur and Gina Moran met with their contacts at various locations: immediately outside the gate of the Army base, in restaurants, and inside of their cars for an additional \$100,000 in Korean Won bank checks from Woong-Seo Koo of IBS that were split between the Morans and Hur. [Ref. 12]

***c. Computer Services Contract***

Ronald A Parrish, 49, a Connecticut resident, was the Chief of the Contract Support Division at the USA-CCK. While acting in this billet, Parrish had access to the bids received on the Computer Services Contract. Richard Lee Carlisle, 31, a businessman from Harrison County, Indiana, was a contractor living in Korea who had hoped to get a contract to provide computer services to USA-CCK. [Ref. 10]

Beginning in July of 2001, Colonel Moran had solicited American Management Systems, Inc., the incumbent contractor, to bid on the upcoming year's Computer Services Contract. The next month, Moran directed Parrish to disclose the bid and the proposal information received from American Management Systems, Inc., and to give it to Carlisle. The proposal information included American Management Systems technical and cost proposal with cost and pricing data. Parrish then assisted Carlisle in preparing Carlisle's technical and cost proposal including necessary cost and pricing data for the award of the computer services contract. After receiving the information via email, Carlisle submitted his bid for the Computer Services Contract. He was awarded the contract in September 2001. [Ref. 15]

## **5. The After-Math**

The Morans went to federal court in Santa Ana, California where they were charged with eleven counts, including accepting bribes, money laundering, and unlawful disclosure of procurement information. Colonel Moran pleaded guilty to bribery and disclosure of procurement information and was sentenced to fifty-seven months confinement without possibility of parole. Although the maximum sentence he could have received for his crime was sixty months, he still got one of the longest public corruption sentences in California's history. [Ref. 10] Gina Moran pleaded guilty to lying to investigators for failing to disclose that she had more than \$10,000 in cash on her when she traveled to the US in June 2001 from Korea. [Ref. 9] She was fined \$5000 and received 2 years of probation. Hur pleaded guilty to bribery charges and was sentenced to house arrest and supervised probation. [Ref. 10]

Parrish and Carlisle were convicted at trial on violations of the Procurement Integrity Act. Their convictions for criminal violations of the Procurement Integrity Act are the first obtained in the nation. [Ref. 10] Parrish received eighteen months and Carlisle received two years in prison sentences. [Ref 12]

Chuck Wilder, a civilian attorney who works for USA-CCK said, "we got rid of several people administratively from the command based on their activities in support of Col. Moran...They committed contracting violations knowingly. Although they probably did not get any bribes, they helped Col. Moran get bribes." [Ref. 12] At the time of

writing this paper, further information cannot be obtained under the Freedom Of Information Act as the investigation is still going on. It is entirely possible that Col Moran may have received bribes from more people that were not discovered or indicted.

#### **6. A Clear Violation or Customary Way or Doing Business?**

Fernando Leone, Hur's lawyer, said that his client was pulled into Moran's plot unsuspectingly. "He was used as a pawn. The colonel needed someone who could speak Korean and do what he wanted him to do. Mr. Hur was victimized...That's how business is conducted in Asia. Everybody's on the take." [Ref. 13] Although the Court did not see Mr. Hur as "victimized", Leone may have a point in regards to how other countries routinely conduct business. According to Paul Herbig who wrote "The Influence of Culture on Bribery: Some Ethical, Socio-political and Economic Considerations", bribery is an accepted and required way of doing business for foreigners who wish to penetrate established arrangements, and by members wishing to network within established business and social circles. Countries with large inefficient bureaucracies may indirectly encourage bribery by offering inadequate salaries to civil servants and by loosely controlling commercial practices.

Many countries accuse the U.S. of a double standard when it comes to bribery. Cash contributions to politicians and political parties are called "donations" in the U.S. whereas another country would regard such payment as bribery. In 1977, after the revelation of Lockheed's more than twelve million dollars in bribes to Japanese government officials and business executives, Congress passed the Foreign Corrupt Practices Act, which is unique in that it regulates the foreign business activities of its citizens. However, since being amended by the 1988 Trade Act, the FCPA now allows managers to make "nominal" payments to foreign officials to expedite routine functions such as approval of licenses and processing government papers. [Refs. 8, 14]

#### **7. Questioning the Motive**

Many wonder why Moran did it. Other than simple, quick answers such as "greed" or "for the money", why would a successful Officer who earned over \$90,000 a year risk it all? Some speculate as to whether Colonel Moran's large gambling debts had a bearing. One bigoted reader on an internet site that discussed the incident blames all

Korean women for “corrupting the minds of our service men”. The Morans were discreet about the money they had and did not live a flashy life-style. [Ref. 12] Court records show that the Morans gradually deposited the money over various bank accounts and investments over time and as such, did not call a lot of attention to themselves. Colonel Moran is the only one who can truly answer why he did it. And he has fifty-seven months to think of a good answer for anyone who asks.

#### **D. FEURTH**

The bribery scandal of the Fuerth Regional Contracting Office (RCO) in Fuerth, Germany illustrates powerful ramifications for the contractor if they are found to be involved in fraudulent proceedings. In this scandal, a group of prospective contractors paid various government employees to exclusively receive solicitations and be exclusively listed on the bidders list. In return, the RCO government employees would limit solicitations of Request For Proposals (RFP) only to the contractors that paid to be on the exclusive bidders list and exclude non-paying contractors from being aware of the list. The contractors on the list would identify themselves to one another and establish a rotation of who would be the lowest bidder on a given contract. The contractor in rotation would set the profit to recover the bribery fee and begin normal profit negotiations from the bribery-recovery-fee threshold. The key to the findings of this scandal is that the Government can recover money paid to the contractor - even on past jobs that the contractor completed to the standards of the Government - provided that proof of fraud is found to exist.

For example, Schuepferling GmbH & Co was awarded a contract in response to a RFP for the painting of family housing quarters in the spring of 1990. The RFP was issued by the Army’s RCO, Fuerth, Germany in the spring of 1990. It was a firm fixed-price procurement and the company was awarded DM 1,360,343.00 on 12 July 1990. From January 1991 through 18 July 1991, the Government issued fifty-one delivery orders on a regular basis. From 11 March 1991 through 6 August 1991, the Government made timely payments to the company for work performed on at least twenty-nine delivery orders for which payment had been invoiced and submitted before 19 July 1991. The Government withheld payment for work, however, for invoices on twenty-two

delivery orders because of suspected violations of the standard Gratuities clause (FAR 52.203-3 (APR 1984) and the False Claims Act (31 USC). This was based on a written statement in which the owner, Mr. Schuepferling, admitted making substantial bribes to various Government employees. Mr. Schuepferling paid the money to Ms. Regina Waltraud McComas, the Government point of contact for the contract. Her job was to not publish the solicitation and to limit it to seven other contractors named by Mr. Schuepferling. Schuepferling then contacted the other firms and rotated the lowest bid by an arrangement among the seven contractors.

Schuepferling testified that the Government directed him to stop work in March, 1991. According to him, the contracting officer (Mr. Harris) told him in early April to start work again and that he would be paid for the work. Both Mr. Harris and the contracting officer's representative (Mr. Hann) testified that the meeting did not occur and no references to future payments were made.

On June 30, 1992, Schuepferling GmbH & Co submitted a certified claim for DM 183,237.22 to the contracting officer for payments withheld regarding the unpaid invoices and an additional claim for Prompt Payment Act interest. After given full opportunity to present their case, Schuepferling GmbH & Co was debarred because of the bribes they paid to government employees. The debarment was issued on September 22, 1992 and was effective through February 28, 1995.

On May 22, 1996, Mr. Schuepferling was assessed exemplary damages based on violations of the Gratuities clause (FAR 52.203-3) and was assessed exemplary damages in the amount of DM 240,000 which was the amount withheld by the Government under contract.

#### **E. K&R**

The drastic remedy of retaining or recovering all contract payments was established in 1980 by the K&R Engineering Company, Inc., case when K&R sued the U.S. Government for payments on three contracts. [Ref. 19] The plaintiff was a contractor engaged in dealings with a government employee. The parties entered three contracts and the Government canceled the third contract. The Government suspended termination settlement negotiations on the third contract when it learned that a grand jury

was investigating the possible bribery charges of a Government employee accepting bribes from K&R. Further, the Government demanded the return of all contract proceeds on the two completed contracts it believed was tainted by fraud and on which K&R had already been paid. The contractor, government employee, and another person subsequently pleaded guilty to various charges. Thereafter, the contractor sued on all three contracts and the Government moved for summary judgment. It was determined that the government employee's activities violated the conflict-of-interest statute, 18 U.S.C. § 208(a). The contractor, strangely enough, did not deny the violations. The contractor paid the government employee a percentage of its profits on all contracts under the agent's the authority. In return, the government employee helped the contractor obtain contracts it otherwise might not have received. The employee also condoned and aided violations of the contract and other improprieties. The unethical relationship between the government employee and the contractor precluded the contractor from recovering damages. The Government was entitled to recover on its counterclaims. The contractor's attempts to avoid the draconian result were unconvincing. The Government's motion was granted.



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### **III. ANALYSIS**

#### **A. DRUYUN ANALYSIS**

Druyun participated personally and substantially as a government employee overseeing the negotiation of the lease from Boeing. While she was serving in this influential position for the Government on this contract, she was simultaneously negotiating employment for herself with a senior Boeing executive. This is a violation of the Conflict of Interest statute, 18 U.S.C. § 208.

Also, Druyun and the Boeing senior executive agreed to maintain a false story regarding the timing of her employment discussions. She also made false statements when first asked about her employment discussions with regards to the timing of when she recused herself from further Boeing discussions. These actions are a violation of the Major Fraud Act, 18 U.S.C. § 1031, making false statements, 18 U.S.C. § 1001, and 18 U.S.C. § 371, conspiracy to defraud.

This case shows that people in government contracting positions must be very careful about their behavior. Druyun could have followed the rules and made a successful transition to commercial employment. Her expertise could have assisted Boeing in creating better products for the Government. However, because she violated the rules, she has suffered the effects of the criminal process. Druyun knew what the rules were but she chose to ignore them. And then she actively worked to cover them up. This case shows that ethical conduct must always be followed and that contracting personnel, from the lowest contracting specialist to the highest policy maker, must follow the rules.

#### **B. MISSISSIPPI VALLEY ANALYSIS**

Adolphe H. Wenzell acted as the Government's key representative in the crucial preliminary negotiations which eventually resulted in the contract that obligated taxpayer money in a business transaction from which he and his company expected to derive a profit in violation of 18 U.S.C. § 434, today codified as the Conflict of Interest statute, 18 U.S.C. 208. This case shows a complicated set of facts that, when taken apart, reveal

that sometimes otherwise normal business practices can violate the law. The case not only presents the seminal understanding of conflicts of interest, it also shows the necessity and value of consulting with counsel (and then following the advice).

### **C. COLONEL MORAN ANALYSIS**

Colonel Richard J Moran used his position as Commander of USA-CCK to receive bribe payments from various contractors while in Korea in violation of 18 U.S.C. § 371, conspiracy to defraud the government and 18 U.S.C. § 201 regarding his receiving bribes.

Moran also directed that the technical and cost proposal data which included cost and pricing data that was submitted by a contractor, be shared with another competing contractor so the competing contractor could win the contract. This is a violation of 49 U.S.C. § 423, the Procurement Integrity Act.

This case shows that even the commander of a contracting activity can be lured by criminal misconduct. The case also shows that there were plenty of signals that should have been seen by members of the command. One person submitted an anonymous tip that led to the investigation of Moran, but the larger question of why so many others allowed the activity to continue is still open. The information shows that a number of employees were fired because they failed to see or speak up on issues they should have known were wrong. Still, that does not explain why they did not speak up. This set of facts points to the need, within contracting offices, to have visibility across contracting actions. It is normally the command staff that oversees the actions of the subordinates, but the subordinates also should have visibility of command actions. Although contracting offices are military commands within DoD, they must operate with more internal visibility because of the mission to safeguard taxpayer money.

### **D. FUERTH**

A group of contractors, on a rotational basis, colluded to bribe government agents in violation of 18 U.S.C. § 201, receiving bribes. Once they got the list of other contractors who were receiving bids, they would raise their contract price by the price of

bribe money in violation of 18 U.S.C. § 371, conspiracy to defraud and ensure that other contractors could not fairly bid on the prospective contract in violation of 49 U.S.C. § 423, the Procurement Integrity Act.

This case shows that contracting officers within contracting activities can be involved in illegal conduct, and that the illegal schemes can be quite sophisticated. However, what the case does not show is what the command or supervisory chain was doing, or not doing, that allowed the activity to continue for an extended period of time.

**E. K&R**

A government employee had received bribes from a private contractor in violation of 18 U.S.C. § 371, conspiracy to defraud the Government and 18 U.S.C. § 201 bribery. The government employee who received the bribes was in violation of 18 U.S.C. § 208, conflict of interest. This particular government employee was not within the contracting office but was within the requiring activity. It is a perfect example of how a contracting officer must have visibility across all levels of the contracting process.

This case also shows the Draconian remedy originally established in the Mississippi Valley case in action. The contractor lost all the contract proceeds on all the contracts tainted by fraud – even those contracts that were successfully performed and accepted by the Government. This is one of the most valuable tools to prevent procurement fraud.

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## **IV. CONCLUSION/RECOMMENDATIONS**

### **A. CONCLUSION**

Those that commit fraudulent acts typically do so in a precise and calculated manner. Although they are not using a weapon such as a knife or gun, they are stealing from innocent people. Their actions divert funds for their own personal use. Every dollar that is obtained by these criminals for use in a quest to pursue their own personal greed is a dollar taken away for the purpose it was intended for: to serve and protect the law abiding tax-payers of the country.

Those who commit these fraudulent acts usually do not commit these crimes on a sporadic impulse. Many of these schemes are well calculated and thought out and involve the strategic coordination of other like-minded partners. The mastermind is normally an educated, well respected, and influential person that enjoys some sort of social status even before they commit these acts. These criminals are rational and believe they can plan a course of criminal action that will not get them caught or even suspected before they act. Therefore, it would not be wise to try and set up a revolutionary system or erect a new task force that would dedicate its existence to monitoring all activities in hopes of stopping this type of activity from ever happening again. The perpetrator would be aware of the checkpoint and would figure out a way around the system that would catch him/her. Also, an enormous amount of time and resources would be spent on effectively implementing this so that the return on investment would not be feasible. In other words, it may require spending \$10 billion dollars and actually save the tax-payers only \$20 million.

### **B. RECOMMENDATION**

It is recognized that the procurement fraud perpetrators are intelligent, conniving individuals. It is therefore recommended that instead of expending resources that would catch them committing an act, that the effort be concentrated on deterrence from committing the crime. A jail term (the one thing that all educated people who enjoy some sort of social prestige loath) should be an expected procedure instead of possible

punishment. In an age of limited local resources to support efforts abroad, the nation should demand nothing less than a top down commitment to ensuring stiffer penalties for those that betray public trust in an effort to pursue their own greediness.

Another recommendation may seem a bit extreme, yet it plays to the very characteristic that influential perpetrators share and seek to avoid, and that is the exposure and public labeling of these people as non-trustworthy. This recommendation falls short of the “Scarlet Letter” in which the guilty adulterous woman had to wear the letter “A” for all to see, but the concept is the same. Just as child molesters are identified within certain communities, so should those who commit fraud be labeled and identified by their actions so that they will be striped of their social status. Dan Khan, co-author of “Shaming White-Collar Criminals: A Proposal For Reform of the Federal Sentencing Guidelines”, believes that if the Federal government has effectively shamed the influential fraudulent perpetrator by some sort of public labeling system, then the perpetrator will be forever incapacitated because he will no longer have the credibility to influence others while he is being shunned by the public. Khan also argues that shaming an individual is more efficient because it provides a high level of deterrence while using less government resources.

### **C. ANSWERS TO RESEARCH QUESTIONS**

#### **1. What Are Some Specific Examples in Which Procurement Fraud Was Committed?**

The Druyun case study, the Colonel Moran case study, the Fuerth case study, the Mississippi Valley case study, and the K&R case study are all specific examples in which procurement fraud was committed. These cases cover the gambit of procurement fraud. From seemingly innocent activity under the Mississippi Valley case, through the apparently victimless crime case of Druyun, to the diabolical activities of the Fuerth contracting officers and Colonel Moran. These cases show specific activities designed to circumvent the laws surrounding government procurement.

#### **2. What Specific Actions Were Violations of the Procurement Process within These Examples?**

In the Druyun case, Druyun participated personally and substantially as a government employee overseeing the negotiation of the lease from Boeing. While she

was serving in this influential position for the Government on this contract, she was simultaneously negotiating employment for herself with a senior Boeing executive. This is a violation of 18 U.S.C. § 208, conflict of interest.

In the Mississippi Valley case, Adolphe H. Wenzell acted as the Government's key representative in the crucial preliminary negotiations which eventually resulted in the contract that obligated tax-payer money in a business transaction from which he and his company expected to derive a profit in violation of 18 U.S.C. § 208, conflict of interest.

In the Colonel Richard J Moran case, he used his position as Commander of USA-CCK to receive bribe payments from various contractors while in Korea in violation of 18 U.S.C. § 371, conspiracy to defraud the government and 18 U.S.C. § 201 regarding his receiving bribes. Moran also directed that the technical and cost proposal data, which included cost and pricing data, to be shared with another competing contractor so the competing contractor could win the contract. This is a violation of 49 U.S.C. § 423, the Procurement Integrity Act.

In the Fuerth case, a group of contractors, on a rotational basis, colluded to bribe government agents in violation of 18 U.S.C. § 201, receiving bribes. Once they got the list of other contractors who were receiving bids, they would raise their contract price by the price of bribe money in violation of 18 U.S.C. § 371, conspiracy to defraud and ensure that other contractors could not fairly bid on the prospective contract in violation of 49 U.S.C. § 423, the Procurement Integrity Act.

Lastly, in the K&R case, a government employee had received bribes from a private contractor in violation of 18 U.S.C. § 371, conspiracy to defraud the government and 18 U.S.C. § 201 bribery. The government employee who received the bribes was in violation of 18 U.S.C. § 208, conflict of interest.

### **3. What Lessons Learned Can One Draw from These Situations that All Contracting Officers Can Benefit From?**

The major lesson learned from researching these cases is that the various schemes to defraud ranged from simply bribery to elaborately orchestrated strategies involving activities within the office where other contracting officers work. When first researching this topic, this research focused on finding a simple process, routine, or



pattern of behavior exhibited inside of the work environment that would be telltale signs of suspicious activities by those that commit procurement fraud. This research has shown that although this may be the case for some obvious instances, that the more elaborate, complex schemes are impossible to detect unless the perpetrator is monitored twenty-four hours a day with wire-taps and continuously followed by an investigator. Contracting officers should simply lead by example and approach every situation as if their actions, statements and decisions are to be reviewed and broadcasts through a news media such as “60 Minutes”. If the contracting officer feels comfortable having all of their professional dealings subjected to the scrutiny of the tax-payer, then they are probably acting ethically. They should have no problem asking questions in situations that do not seem right to them and have the moral courage to protect the taxpayer in situations where their boss or peers may act unethically.

## **APPENDIX A. APPEAL OF ANDREAS BOEHM MALERGROSSBETRIEB**

Appeal of -- Andreas Boehm Malergrossbetrieb ASBCA No. 44017 Armed Services Board of Contract Appeals 2001 ASBCA LEXIS 44; 2001-1 B.C.A. (CCH) P31,354 March 15, 2001 CONTRACT: [\*1] Contract No. DAJA04-89-C-0402 JUDGES: J. STUART GRUGGEL, JR., Administrative Judge. MARK N. STEMLER, Administrative Judge, Acting Chairman, EUNICE W. THOMAS, Administrative Judge, Vice Chairman, concur. COUNSEL: APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq., Frankfurt, Germany. APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA, Chief Trial Attorney, MAJ Michael J. O'Farrell, Jr., JA, CPT Gregg M. Schwind, JA, Trial Attorneys. OPINION BY: GRUGGEL, JR. OPINION: OPINION BY ADMINISTRATIVE JUDGE J. STUART GRUGGEL, JR. ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal is from a constructive denial of certified claims for payment of invoices for work appellant performed, Prompt Payment Act interest, additional work and remission of liquidated damages. The Government moved for dismissal based on lack of jurisdiction contending that the subject contract was tainted by bribery in the inducement and therefore void ab initio. Appellant's opposition thereto denied, inter alia, that the contract was either void ab initio or obtained through bribery and invoked its rights to a hearing, pursuant to Board Rule 5(a) with respect to the facts it contended were relevant to the Government's [\*2] motion. The hearing thereon was subsequently held in Heidelberg, Germany (tr. 28-29). Both parties have supplemented the record with multiple document filings pursuant to Board Rule 4 together with trial exhibits (id.).

### **FINDINGS OF FACT FOR PURPOSES OF THE MOTION**

1. Solicitation No. DAJA04-89-B-0088, a Standard Form 1442, sealed bid, firm fixed price, lump sum procurement for the construction of two U-Coft Platforms including utilities, at Warner Barracks I in Bamberg, Germany, was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany on 7 August 1989 (R4, tab 1). Block 9 of the solicitation identified Mr. Goesl, a RCO Fuerth contract specialist, as the point of contact to call for information pertaining to the solicitation. Appellant's bid in response to the solicitation was signed and

submitted by its manager, Mr. Peter Boehm, on 30 August 1989 (id.; tr. 33). The construction project was awarded to appellant as Contract No. DAJA04-89-C-0402 (contract 0402) on 27 September 1989 in the amount of DM 198,796.00. The award was signed by Brigitte Stenzel, a contracting officer for RCO, Fuerth (id.).

2. The contract contains the following relevant [\*3] clauses: FAR 52.202-1 DEFINITIONS-ALTERNATE 1 (APR 1984); FAR 52.203-1 OFFICIALS NOT TO BENEFIT (APR 1984); FAR 52.203-3 GRATUITIES (APR 1984) (“the Gratuities clause”); FAR 52.203-5 COVENANT AGAINST CONTINGENT FEES (APR 1984); USEUCOM SUPP. 52.225-9901 LAW GOVERNING CONTRACTS (JAN 1986-E); FAR 52.203-7 ANTI-KICKBACK PROCEDURES (OCT 1988); FAR 52.233-1 DISPUTES (APR 1984); FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); FAR 52.209-5 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT AND OTHER RESPONSIBILITY MATTERS (MAY 1989) (R4, tab 1).
3. Bilateral Modification No. P00001, dated 12 July 1990, substituted a masonry building to be constructed by appellant for the prefabricated building that originally was to be installed by appellant (R4, tabs 2-3, 6-7). Modification No. P00001 increased the contract amount from DM 198,796.00 to DM 202,146.00 and extended the completion date thereof to 14 September 1990 (id.).
4. (a) On 16 November 1990, Mr. Goesl was interviewed by the Nuernberg Criminal Police Directorate (SR4, tab 14; ex. G-4 at 8). Mr. Goesl stated that he received “bribe payments” from at least 15 German construction firms, including appellant ( [\*4] id.). Said bribe payments were received in exchange: to some extent for nothing at all and partly through the release of the firms that were also submitting bids, to the respective contractor. With list I mean the source list. To 90% the contractor already knew the estimate for the project. I assume that the contractor had already received the estimate from the assigned engineer (designer) who had prepared the estimate. I would even go as far as saying that the respective estimate was known to the contractor to 99%. (Id.). At his 29 February 2000 evidentiary deposition, Mr. Goesl acknowledged that he had given the above-quoted statement adding that it was “made under stress” since said statement was made while he was being held by the German authorities in “pretrial confinement” (ex. G-4 at 8-10). (b) On 20 November 1990, while still held in pretrial confinement, Mr. Goesl stated that he “probably received about DM 6,000.00 from Firm BOEHM, Mr. BOEHM in person. I believe it was Mr. BOEHM Junior” in answer to a question seeking detailed information regarding “various construction companies from whom [Mr. Goesl] had received bribes” (SR4, tab 15; ex. G-4 at 8-9). (c) On 21 [\*5] December 1990, Mr. Goesl provided a statement, through his attorney, Mr. Link, to the Nuernberg Criminal Police Directorate regarding bribe payments he received from German contractors during the 1989-1990 time period (SR4, tab 1; exs. G-3, -4 at 10-11). Mr. Goesl's 21 December 1990 statement was prepared after he had been released from

pretrial confinement (ex. G-3; SR4, tab 1). Specifically, Mr. Goesl stated that he was bribed by the payment of DM 4000.00 sometime during October, 1989 from Mr. Boehm for the award of contract 0402 (SR4, tabs 1, 14-15). The statement was based upon "a handwritten list of names, contract numbers, dates and bribe amounts" prepared by Mr. Goesl and which Mr. Goesl discussed with Mr. Link prior to the submission of Mr. Goesl's statement (ex. G-3). Mr. Link "wrote down additional information below the information written by Mr. Goesl and made check marks and question marks next to several of the entries made by Mr. Goesl" (id). Mr. Goesl's statement that "I however want to stress that I do not totally remember the past years" refers to his activities during "1987 and 1988" since Mr. Goesl did not then have with him the lists containing contract procurements [\*6] for which he was responsible during those years (SR4, tab 1). Mr. Link wrote down a question mark (i.e., "?") in the space located immediately to the right of and corresponding to the above described entry regarding the bribe paid for the award of contract 0402 (ex. G-3). With respect to his actions, *vel non*, rendered in return for the payment of the bribe money, Mr. Goesl "mentioned the other bidders to the stated firms. After the opening of the bids the contract was awarded to the cheapest bidder" (SR4, tab 1). (d) On 27 December 1990, Mr. Goesl made: an additional statement to the letter dated 21 Dec 90, received by the Nuernberg criminal police from my lawyer Mr. LINK. Passing on the information on the mentioned firms concerning a specific project to the so-called person concerned happened in writing so that the individual person received a handwritten note with about 10 to 15 names of other bidders. By that I mean those firms that we wanted to ask for a bid. Q: When mailing out solicitations were other equal, potential bidders left out on the list? A: No, they were not. I assume that the addressed firms dealt with it among themselves. (SR4, tab 16; ex. G-4 at [\*7] 11-12) (e) Mr. Goesl's statements dated 16 November, 20 November and 27 December 1990 were freely made after he had coordinated with his attorney and signed only after he had verified the accuracy of the transcript of his statements (SR4, tabs 1, 14-16; exs. G-3, -4 at 8-12).

5. Appellant represented that the work was 99 percent complete by invoice dated 6 May 1991 (R4, tab 26). Appellant completed work on contract 0402 on 28 May 1991 (R4, tab 31).
6. Appellant submitted its final payment invoice and an equitable adjustment claim stemming from alleged performance of additional work by letter dated 10 June 1991. Said letter contained reservation language stating, "we reserve herewith furthermore the right to claim the costs of our delay of the contract imposed by the late Government decision making on modifications . . . and claim for the remission of so much in liquidated damages" (R4, tab 33).
7. By letter dated 16 September 1991, appellant asserted its claim for payment of its final invoice, reiterated its claim for additional work and disputed the Government's right to assess liquidated damages (R4, tab 36).
8. On 17 September 1991, appellant was suspended from contracting with [\*8] the U. S. Government (R4, tab 37).

9. By letter dated 24 September 1991, the contracting officer informed appellant that the Government would be withholding payments under the contract based on preliminary findings by the U. S. Government that the "contract was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (R4, tab 38).
10. On 14 January 1992, appellant appealed the contracting officer's constructive denial of its claims asserted under the contract to the Armed Services Board of Contract Appeals. The Board docketed the appeal as ASBCA No. 44017. The claims included the final invoice of DM 38,407.74, Prompt Payment Act entitlement on the unpaid invoice, additional work in the amount of DM 33,834.70 and remission of liquidated damages "in an amount not yet determined" (tr. 63; R4, tab 39).
11. (a) During the course of performance of the contract, appellant's manager, Mr. Peter Boehm, was investigated by the Nuernberg Criminal Police Directorate in connection with the payment of bribes to RCO, Fuerth contracting personnel. On 4 April 1991, Mr. Boehm admitted that he had paid "bribe money to the employees of the RCO in Fuerth," as follows: "to Mrs. [\*9] Stenzel about 15,000.00 since 1985, as far as I remember. To Mr. Goesl may be DM 20,000.00, also since 1985. To Mrs. Flannery-Bateman also about DM 20,000.00 since 1985" (SR4, tabs 2-3; tr. 58, 64). Mr. Boehm did not identify the specific contracts for which he paid bribe money in order to obtain the award thereof (id.). In January 1991, Mrs. Stenzel's husband went to Mr. Boehm's house to talk about the bribery case. He asked Mr. Boehm if the German Criminal Police had already contacted Mr. Boehm. Mr. Boehm indicated that, "during the conversation we tried to establish how much bribe money was paid during the years to his wife and we arrived at the sum of about DM 15,000.00." (Id.) During the course of Mr. Boehm's testimony at the hearing he stated, "the money simply was paid, and let me put this in very simple words, simply to stay in business, in order to get contracts and in order to actually get solicitations and requests for submitting offers on contracts." (tr. 42). Mr. Boehm signed a Certificate of Procurement Integrity which certified that he would comply with contract rules and would accept the contract as is. (Tr. 48-49; R4, tab 1) Mr. Boehm did not see paying money [\*10] to U. S. Government employees as a violation, but as a way to show "good will" (tr. 49). When asked whether he knew that it was against the U. S. Government laws and regulations to give such monetary gifts or gifts of value, he replied by saying, "Maybe" (tr. 49). (b) On 7 May 1991, Mr. Boehm's attorney provided a statement on Mr. Boehm's behalf to the Criminal Police Directorate. Mr. Boehm stated he gave Mrs. Stenzel--DM 15,000.00, Mr. Goesl -- DM 20,000.00, Mrs. Pierce--presents in the form of property with a value of about DM 10,000.00 and Mrs. Flannery-Bateman--about DM 20,000.00 consisting of cash and presents. Mr. Boehm's rationale for making these payments was explained, as follows: In a relatively lonely decision, without his father's knowledge, the owner of the firm, Mr. Peter BOEHM decided to calculate very carefully to set free money, and not by raising the prices, and then use that money to pay the agents. At first he attempted to get the attention by giving small

presents, in that he did not want to get into the illegal game and to avoid paying bribes. The presents were accepted by almost all persons who had something to do with the contracts the firm Boehm received, [\*11] however the business did not increase. . . . Also, Mr. BOEHM has to state at this point that this type of business (bribery) was not initiated by him, but a lot later when some of his competitors already knew about it. It was a question of existence of the firm BOEHM, if he would participate in this game (howl with the wolves) or get completely out of it. (SR4, tab 3) Mr. Boehm, again, was “unable to come up with a list of contracts for which he paid money” (SR4, tabs 2-3). Mr. Boehm only received a couple of “solicitations that [had] not been published properly in terms of being posted on a bulletin board or advertised” (tr. 56). Further, he stated during the hearing that “because it has shown former times that if you haven't give any gifts or gratuities to that guys, you won't get no solicitations” (tr. 51). The solicitations were comprised of the specifications and offer sheets (tr. 51). (c) Appellant was awarded eight to ten contracts per year by RCO, Fuerth during the 1985-1990 period (SR4, tab 2). At the hearing, Mr. Boehm, for the first time, denied that he had paid any sums whatsoever to Mr. Goesl in connection with the award of contract 0402 (tr. 40-42; findings 11(a)-(b)). [\*12] He also testified that his payments to RCO, Fuerth employees during the 1985-1990 time period were not “bribes” but, rather, were expressions of “good will” (tr. 46-52). Neither appellant nor Mr. Boehm was prosecuted by German authorities in connection with either contract 0402 or other U. S. Government contracts. Mr. Boehm presently faces a suit for “civil fraud” in the form of bribery in connection with, inter alia, the award of contract 0402 in an action brought by the United States in Nuernberg-Fuerth Regional Court, Germany on 5 November 1993 (ex. G-1).

12. Mr. Goesl was indicted on 8 January 1992 by the District Attorney's Office at the District Court, Nuernberg, Germany for receiving bribes and tax evasion for not declaring the bribe money as income on unspecified dates between 1984 and 1990 in a total amount of at least DM 1,106,103.00 from construction firms, including appellant, “in return for supporting these firms in the award of construction contracts by manipulations contrary to duty before and during the solicitation process.” (SR4, tab 4; ex. G-4 at 12-13) The money was allegedly given to him in cash either in his apartment in Nuernberg or in his office in Fuerth [\*13] (id.). Regarding the acceptance of bribes, Mr. Goesl “was acting from the beginning on the basis of a uniform determination of his will directed at a repeated commission of the offence” (id.). Said indictment does not specifically identify contract 0402 as a contract which Mr. Goesl obtained for appellant in return for appellant's payment of bribe money (id.; SR4, tab 1).
13. On 31 August 1992, Mr. Goesl was sentenced to imprisonment of one year and seven months because of tax evasion associated with the bribe payments he received during the 1985-1988 period but which he had not declared as taxable income (tr. 7-8; SR4, tab 4; ex. G-4 at 13). Mr. Goesl was not convicted of either bribery or tax evasion associated with any contracts, including contract 0402, that were solicited and awarded during 1989 (id.; R4, tab 1).

14. On 10 February 1992, the Criminal Police Directorate interviewed Karl-Heinz Maennling, manager of appellant from 1 September 1979 to 30 September 1984 (SR4, tab 5). Mr. Maennling indicated that firms, including appellant, were price rigging regarding different projects at least through 1984 (id.). He described bribery schemes involving appellant, [\*14] as well as other German construction contractors, and identified RCO, Fuerth personnel who received bribe money in connection with the award of U. S. Government contracts (id.). He identified Mr. Goesl as one of the RCO, Fuerth employees who was “specially liked” by appellant for purposes of bribery, at least through 1984 (id.).
15. By letter dated 2 October 1992, Mr. Peter Boehm was debarred by the U. S. Army from contracting with the U. S. Government through 16 September 1995 (SR4, tab 6).
16. On 15 April 1996, the Deputy Commander of the U. S. Contracting Command Europe sent a memorandum to the Suspension and Debarment Office concerning a suspected violation of the Gratuities clause (FAR 52.203-3) by appellant (SR4, tab 7).
17. On 8 May 1996, the Government notified appellant of the Gratuities clause violation proceedings to be held pursuant to FAR 52.203-3, which had been incorporated into the contract. Appellant was afforded the opportunity to either file written matters in opposition or advise the Government whether appellant wanted an in-person hearing. (SR4, tab 8)
18. By letter dated 28 June 1996 appellant's attorney notified the Government of its opposition to appellant's [\*15] suspected violations of the Gratuities clause (SR4, tab 9).
19. On 29 August 1996 Gratuities clause proceedings were held by James F. Gravelle, Colonel, U. S. Army, Hearing Officer. It was concluded that in October 1990 (sic), Mr. Peter Boehm gave DM 4,000.00 in cash to Warner Goesl in consideration of Mr. Goesl's assistance in ensuring award of contract 0402 (SR4, tabs 1, 10). The acts or failures to act that may have comprised Mr. Goesl's “assistance” with respect to “ensuring” the award of contract 0402 to appellant are not identified. It was concluded that Mr. Boehm's payment of DM 4,000.00 violated the Gratuities clause incorporated by reference into the contract. Based on these findings, it was recommended that appellant's right to proceed under the contract be terminated and that exemplary damages be assessed in the amount of six times the amount paid; DM 4,000.000 or DM 24,000.00. (SR4, tab 10)
20. By letter dated 3 December 1996, Mr. Kenneth J. Oscar, Deputy Assistant Secretary of the Army (Procurement), found that respondent's payment of DM 4,000.00 to Mr. Goesl violated the Gratuities clause. The letter then directed the contracting officer to terminate the respondent's [\*16] right to proceed under the contract and assessed exemplary damages six times the amount of the gratuity paid equaling DM 24,000.00. (SR4, tab 11)

21. The contracting officer, by letter dated 20 December 1996, notified appellant that its right to proceed under the subject contract was terminated in accordance with the Gratuities clause and the order of the Deputy Assistant Secretary of the Army (Procurement) dated 3 December 1996. The contracting officer also advised appellant that exemplary damages would be assessed in the amount of DM 24,000.00. However, since the United States had already withheld this amount, no collection action, on the part of the U. S. Government, was initiated (SR4, tab 12).
22. (a) Neither Mr. Goesl nor his attorney, Mr. Link, testified at the 9 February 2000 hearing on the Government's jurisdictional motion (tr. 80-83). The presiding administrative judge granted permission for their testimonies to be presented either by evidentiary deposition or by affidavit (id.). The Government timely submitted Mr. Goesl's testimony in the form of an evidentiary, videotaped deposition dated 29 February 2000 (ex. G-4; tr. 88-91) and Mr. Link's testimony in the form of [\*17] an affidavit, dated 29 February 2000, acknowledged by Mr. Link to be "true and correct to the best of his knowledge and belief" (id. at 2-3; ex. G-3). Mr. Link was present and available for deposition at Mr. Goesl's evidentiary deposition (id.). Counsel for the Government has represented that Mr. Link's 29 February 2000 affidavit "was indeed sworn" (Gov't br. at 4-5). (b) Appellant's counsel did not attend the 29 February 2000 deposition, supra, despite having apparently been afforded adequate notice thereof by the Government (tr. 80-83, 88-91; exs. G-2, -4 at 1-3; app. br. dated 23 June 2000 at 7-8; Gov' br. dated 10 August 2000 at 4). Appellant's counsel requested that the evidentiary record remain open through 15 October 2000 due to his "recent hospitalization" for the purpose of filing a reply brief (Bd. corres. file). No such reply brief has been filed on appellant's behalf. The adequacy of the Government's "notice" with respect to the above-described evidentiary proceedings has thus not been rebutted. Moreover, this Board has not been requested by appellant's counsel to reopen the record for the purpose of obtaining and submitting additional evidentiary affidavits [\*18] and/or affidavits with respect either to the adequacy of said "notice" or the substance of the testimonies of Messrs. Goesl and Link (tr. 89; Bd. corres. file). (c) During his evidentiary deposition, Mr. Goesl, inter alia, affirmed that he had given the statement as set forth by his attorney, Mr. Link, in Mr. Link's letter to the Nuernberg Criminal Police Directorate, dated 21 December 1990 (ex. G-4 at 10-11; finding 4 (c)). He also stated that he had the "written list, yeah, of contracts awarded at that time. But it was not a complete set of contracts. There were some of them were in it, some were not available. It was not very accurate stuff" (id.; finding 4 (c)). He then testified that he "looked into the information and those money amounts, and I added whatever" to the "information that went into the letter" (id.). (d) Exhibits G-3 and G-4 (Mr. Goesl's deposition and Mr. Link's affidavit) have been received in evidence over the objection of appellant's counsel.



## DECISION

We agree with the Government that contract 0402 was tainted by bribery from its inception. The operative facts herein clearly and convincingly establish that Mr. Boehm, appellant's manager, bribed [\*19] Mr. Goesl, the Government's contract specialist assigned to the procurement action that resulted in the award of contract 0402 to appellant, for the purpose of compromising the bidding process with respect to subject contract (findings 1, 4(a)-(e), 11(a)-(c), 12-14, 16-20, 22(a)-(d)). The amount of the bribe paid for the award of subject contract was DM 4000.00 (id.). Mr. Boehm also paid additional moneys to Mr. Goesl before, during and after the award of subject contract for the admitted purpose of "getting contracts," acts which he later disingenuously characterized as "good will" and which he denied were "bribes" (findings 11(a)-(c)). We recognize that Mr. Goesl's 21 December 1990 statement, submitted by and through his attorney, that he was bribed by Mr. Boehm for the award of contract 0402, is contrary to Mr. Boehm's statement at the hearing wherein Mr. Boehm denied making any payments whatsoever to Mr. Goesl in connection with the award of contract 0402 (finding 11(c)). We are also cognizant of the absence of any mention of contract 0402 (including the procurement that led to the award thereof) in the indictment of Mr. Goesl for bribery and tax evasion and the absence in [\*20] his conviction for tax evasion of any mention of the alleged payment by Mr. Goesl of DM 4000.00 for the award of contract 0402 (findings 12-13). The fact remains, however, that Mr. Goesl contemporaneously admitted receiving the specific bribe of DM 4000.00 for contract 0402 (finding 4(c)) and, except for his self-serving testimony at the 9 February 2000 hearing, Mr. Boehm has otherwise consistently maintained that he could not remember the contracts for which he paid bribes (findings 11(a)-(b)). Moreover, the operative facts herein persuasively establish that Mr. Goesl sought to enable appellant's manipulation or management of the competitive bidding process in furtherance of a corrupt scheme specifically related to the award of contract 0402 by "passing on the information on [the] . . . other bidders [so that appellant and] . . . the addressed firms [could deal] with it among themselves" (findings 4(d), see also 4(a)-(c), 4(e), 11(a)-(c), 12-14, 17-20). Under these circumstances, we agree with the Government that the contract was tainted by bribery from its inception. See

Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA P 26,659 and cases [\*21] cited therein; Schuepferling GmbH & Co., KG, ASBCA No. 45565, 98-2 BCA P 29,739; Schuepferling GmbH & Co., KG, ASBCA No. 45567, 98-2 BCA P 29,828; and Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, slip op. dated 30 January 2001. The primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption compel our holding that this contract is void ab initio and cannot be ratified (id.). Consequently, appellant is not entitled to equitable remedies for work actually performed (id.). We have considered appellant's other arguments and have determined that they are devoid of merit. The Government's motion to dismiss this appeal because the contract is void ab initio is granted. The appeal is dismissed with prejudice. Dated: 15 March 2001 J. STUART GRUGGEL, JR. Administrative Judge Armed Services Board of Contract Appeals I concur MARK N. STEMLER Administrative Judge Acting Chairman Armed Services Board of Contract Appeals I concur EUNICE W. THOMAS Administrative Judge Vice Chairman [\*22] Armed Services Board of Contract Appeals.

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## **APPENDIX B. APPEAL OF SCHUEPFERLING GMBH & CO.**

Appeal of -- Schuepferling GmbH & Co. KG ASBCA No. 45565 Armed Services Board of Contract Appeals 1998 ASBCA LEXIS 69; 98-2 B.C.A. (CCH) P29,739 April 28, 1998 CONTRACT: [\*1] Contract No. DAJA04-90-C-0047 JUDGES: J. STUART GRUGGEL, JR., Administrative Judge. MARK N. STEMLER, Administrative Judge, Acting Chairman, MONROE E. FREEMAN, JR., Administrative Judge, Acting Vice Chairman, concur. COUNSEL: APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq., Parker, Poe, Adams & Bernstein, Sulzbach, FRG. APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA, Chief Trial Attorney, MAJ Cynthia A. Gleisberg, JA, Trial Attorney, Headquarters, U.S. Army Europe & 7th Army. OPINION BY: GRUGGEL, JR. OPINION: OPINION BY ADMINISTRATIVE JUDGE J. STUART GRUGGEL, JR. This is an appeal from a constructive denial of appellant's certified claim for payment of invoices for work appellant performed but for which appellant was not paid by the Government. The Government moved for dismissal based on lack of jurisdiction contending that subject contract was tainted by bribery in the inducement and therefore void ab initio. Appellant's opposition thereto denied, inter alia, that the contract was void ab initio or obtained through bribery and invoked its right to a full hearing, pursuant to Board Rule 5(a) with respect to the facts it contended were relevant to the Government's motion. A one-day, full [\*2] evidentiary hearing was subsequently held in Heidelberg, Germany (tr. 5-40). Both parties have fully supplemented the record with multiple document filings pursuant to Board Rule 4 together with trial exhibits (id.). The parties have also submitted mutual, comprehensive stipulations of fact with respect to the matters involved herein.

### **STATEMENT OF FACTS**

1. Solicitation No. DAJA04-89-R-0332, a Standard Form 1442, negotiated (Request For Proposals), fixed price requirements solicitation for the renovation/thermal insulation of building facades on buildings at the Pastorius installation, Nuernberg Housing Area (Project Nos. RJ-05201-8P and RJ-05202-8P), Germany was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany sometime during the Fall of 1989 (R4, tab 1; tr. 45-47). The solicitation named

- Mrs. Flanery-Bateman as the RCO, Fuerth employee to call for information relating thereto (id.; stip. 13). Appellant's proposal in response to the solicitation was signed and submitted by its Executive Manager/Owner Mr. Jurgen Schuepferling, on 20 September 1989 (id.; tr. 42, 91). The project that was the subject of the above described solicitation was awarded [\*3] to appellant as Contract No. DAJA04-90-C-0047 (contract 0047) on 18 December 1989 in the amount of DM 1,445,055.10 (id; stip. 46).
2. The contract contains the standard Definitions (FAR 52.202-1 (APR 1984)), Officials Not To Benefit (FAR 52.203-1 (APR 1984)), Gratuities (FAR 52.203-3 (APR 1984)), Covenant Against Contingent Fees (FAR 52.203-5 (APR 1984)), Law Governing Contracts (USEUCOM Supp. 52.225-9905 (JAN 1986-E)), Anti-Kickback Procedures (FAR 52.203-7 (OCT 1988)), Remedies for Illegal or Improper Activity (FAR 52.203-10 (MAY 1989)), Disputes (FAR 52.233-1 (APR 1984)), Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters (FAR 52.209-5 (MAY 1989)), and Contract Award (FAR 52.215-16 (APR 1985)) contract clauses (R4, tab 1).
  3. The Government issued the notice to proceed on 16 January 1990 thereby establishing 12 September 1990 as the contract completion date (R4, tab 3). Between 15 March 1990 and 4 December 1990, appellant submitted nine invoices to and was paid by the Government for its performance under contract 0047 (R4, tabs 6, 8-9, 13-15, 17, 21-22; tr. 47). During the same period, the parties executed bilateral contract [\*4] Modification Nos. P00001 and P00002 whereby the contract completion date was extended and the contract price was increased by DM 146,814.00 to DM 1,591,869.10 in order to fully compensate appellant for its performance of additional work, described in a document, dated 10 May 1990, entitled "Change Request # 1" under the Changes clause (stip. 46; R4, tabs 10, 16, 18, 20). Appellant had performed 98% of the work under contract 0047, as modified, by 14 November 1990 (R4, tab 22). The Government had paid, less 10% retainage, for said work by 4 December 1990 (id.). During this same period, the parties were also discussing the addition of certain extra work described in a document, dated 15 October 1990, entitled "Change Request # 2" (R4, tab 28).
  4. Mrs. Flanery-Bateman, the Government's point of contact for Solicitation No. DAJA04-89-R-0332 (finding 1), worked as a contract specialist in the Services & Maintenance Branch, Regional Contracting Office, Fuerth during the solicitation that led to the award of contract 0047 (stip. 13; R4, tab 1; Gov't mot. to dismiss at attach. 1; SR4, tabs 2-3). On 7 November 1990, Mrs. Flanery-Bateman admitted, in pertinent part, during interviews conducted [\*5] by the German police at the "Nuernburg Criminal Directorate, K-42" that various contracting firms had paid her approximately DM 400,000.00 (id.; stip. 13).
  5. By 8 November 1990, the Criminal Investigation Division (CID) had information "indicating that [inter alia, Jurgen Schuepferling] was involved in a scheme to restrain trade through bribery" (stip. 14). On 10 December 1990, the Command Legal Counsel for the U.S. Army Contracting Command Europe was briefed by the CID regarding the illegal activities of the RCO Fuerth (stip. 15)

6. On 20 December 1990, Mr. Jurgen Schuepferling issued a statement to the German Criminal Police in which he stated, inter alia, that he “paid about DM 40,000.00 to [Mrs. Flanery-Bateman] for awarding . . . contract [0047]” (stip. 16; SR4, tab 4 at 1/5-3/5; SSR4, tab W). Mr. Schuepferling stated that Mrs. Flanery-Bateman's “return service was . . . to inform me what other bidders [she] had written to during the solicitation and asked me if I myself was able to state any other bidders that [she] would get involved in the solicitation process” (id.). Mr. Schuepferling contacted said “firms” and then submitted, by arrangement, the lowest [\*6] bid (id.). Mr. Schuepferling further stated that he started paying bribes to obtain Army contracts because without a bribe payment, he received fewer and fewer contracts (id.; tr. 88-92; SSR4, tabs A, D). Mr. Schuepferling did not complain to U.S. contracting personnel with respect to not receiving solicitations (id.).
7. On 29 January 1991, Mr. Jurgen Schuepferling signed a written statement in the presence of his lawyer admitting that he had paid a “bribe” of approximately DM 30,000.00 to Mrs. Flanery-Bateman, for the award of contract 0047 because “it was made clear to me that I would not be awarded contracts without paying” (SR4, tab 4, encl. 4; stip. 18).
8. On 8 February 1991, bilateral Modification No. P00003 extended the contract completion date to 15 February 1991 in connection with the processing of pending changed work (stip. 47; R4, tab 23). Appellant had performed 99% of the work under contract 0047, as modified, by 27 February 1991 (R4, tab 24). The Government had paid appellant the sum of DM 1,575,950.41 (representing the then contract price of DM 1,591,869.10, less the 10% retainage amount--DM 15,918.69) for said work by 21 March 1991 (id.; R4, tab [\*7] 32). Modification No. P00004, dated 24 April 1991, and Modification No. P00005, dated 17 June 1991, subsequently extended the contract completion date to 30 June 1991 in connection with the pending “Change Request # 2” work (stips. 49-50; R4, tabs 27, 29; tr. 62-64). By letters dated 28 March 1991 and 21 June 1991, the contracting officer advised appellant that liquidated damages would be assessed if appellant did not complete performance by 30 April 1991 and 15 July 1991, respectively (stips. 48, 51; R4, tabs 26, 30; tr. 66). Modification No. P00006, dated 3 July 1991, bilaterally extended the contract completion date to 15 July 1991 and increased the contract price by DM 7,336.00 to DM 1,599,205.10 in order to incorporate the work described under proposed “Change Request # 2,” supra (stip. 52; R4, tabs 23-31; tr. 63).
9. On 28 February 1991, upon request from the U.S. Army Contracting Command Europe, appellant and Mr. Jurgen Schuepferling were suspended from contracting with the United States Government (stips. 68-69; tr. 47, 143). Said parties were thus “ineligible for award of U.S. Government contracts, effective 28 February 1991” (SR4, tab 5).

10. By memorandum dated 22 March [\*8] 1991, the Government's Regional Counsel notified the contracting officer for contract 0047 that contracts with debarred or suspended contractors "should not be modified to expand the scope of work . . . ." (SSR4, tab J).
11. The parties have stipulated that on 21 March 1991, Ella Snell, Chief RCO Fuerth, noted in a memorandum that "the troops are returning from Saudi . . . they have no where [sic] else to go. . . . we can fight the battle later on. . . . As the CID said . . . , this office continues to give contracts to firms which they continue to investigate." Our review of said memorandum establishes that it does not refer to or relate to contract 0047 (stip. 72; app. ex. 22).
12. On 23 April 1991, a policy was published with respect, inter alia, to contract 0047 that the Government could continue contracts in effect at the time a contractor had been debarred or suspended. It further advised that "careful review must be made of each change to ensure that it is truly within the scope of the existing contract. Actions should be given priority in order to complete them in a timely manner" (SSR4, tab L; stip. 73).
13. Contract No. DAJA04-90-D-0047 was first identified by the CID [\*9] to the contracting office on 19 June 1991 as obtained through bribery (stips. 17-21; SSR4, tabs E, P; tr. 121, 129-30). 14. Appellant had performed all work and had invoiced the Government for full payment under contract 0047, as modified through Modification No. P00006, by 31 July 1991 (R4, tab 32; tr. 64-65). By letter dated 2 August 1991, the contracting officer notified appellant that payment was being withheld based on preliminary findings of an ongoing U.S. Government investigation that contract 0047 was awarded "under circumstances which could be viewed as fraudulent or criminal in nature" (R4, tab 33; stip. 53; tr. 72-74).
15. Modification No. P00007, dated 10 October 1991, bilaterally reduced the total contract price by DM 225.00 from DM 1,599,205.10 to DM 1,598,980.10 (R4, tab 36; tr. 64).
16. On or about 16 October 1991, appellant was notified that appellant's suspension from contracting with the U. S. Government was continued under authority of FAR 9.407-2(a) due to appellant's bribery of U.S. Government employees in order to secure contract awards (stip. 41). By letter dated 16 October 1991, the contracting officer notified appellant that payment on its final invoice [\*10] amount of DM 23,029.69 plus additional withholding in the amount of DM 275.00 was being withheld as required by AFAR 9.490(f) since the contract was awarded under conditions which could be viewed as fraudulent or criminal in nature (R4, tabs 35, 37; stip. 54; tr. 63).
17. In the Fall of 1991, appellant filed suit in a German Court (pursuant to the provisions of the applicable Status of Forces Agreement) against the Federal Republic of Germany acting "in the interest" of the United States for payment of the unpaid invoices under contract 0047 that are involved in this appeal (stips. 84-85). The United States of America asserted, inter alia, that appellant had

contractually agreed to waive its right to seek redress in German courts under German law by virtue of the Disputes clause and choice of law clauses contained in contract 0047 (app. exs. 39, 41). Appellant withdrew its above described suit in German Court on or about 7 May 1992 (stip. 86).

18. On 30 June 1992, appellant submitted its certified claim in the amount of DM 23,029.69 to the contracting officer for payments with respect to contract 0047 (R4, tab 38; stip. 56; tr. 64). Said claim includes the price (DM 15,918.69) [\*11] of the work performed by appellant prior to February 1991 withheld by the Government during appellant's performance (findings 3, 8, 14; R4, tabs 6, 8-9, 13-15, 17, 21-22, 24, 32, 35; tr. 64-65, 89-91). Appellant also asserted an additional claim for Prompt Payment Act interest thereon (id.).
19. By letter dated 9 July 1992, the contracting officer informed appellant that the Prompt Payment Act was not applicable (R4, tab 39). The contracting officer also stated that, based on preliminary findings of an ongoing investigation into the alleged bribes, payment on appellant's final invoice amount of DM 23,029.69 would be withheld (id.; stip. 55). Moreover, "since the investigations have not been completed yet, and since the legal case is still pending, a Final Contracting Officer's Decision for this matter will not be issued" (id.).
20. Appellant was debarred, after a full opportunity to present its defenses, from contracting with the U.S. Government based upon paying bribes to U.S. Government employees for the award of Government contracts (stips. 74-76; SR4, tab 5). This debarment, issued on 22 September 1992, was effective through 28 February 1995 (id.).
21. On 12 January [\*12] 1993, appellant appealed the contracting officer's constructive denial of its claim under contract 0047 to this Board (R4, tab 40; stip. 58).
22. On 12 May 1995, Judge Neidinger of the District Court of Fuerth, Germany, entered a Penal Order against appellant's Executive Manager/Owner, Mr. Jurgen Schuepferling, imposing a prison sentence and monetary fine for Mr. Schuepferling's violations of Section 334 of the German Criminal Code, entitled "Bribery" (stips. 81-83; SR4, tab 1). The Penal Order, inter alia, identified contract 0047 as having been obtained through bribery by Mr. Schuepferling: 2. At a point in time in 1990 which can no longer be determined exactly you paid to Mrs. Flanery Bateman, who is facing charges in separate proceedings, for the facade project in Nurnberg, contract no. DAJA 0490-C-0047, total project amount: DM 1,445,055.10, an amount of DM 30,000.00 in cash to cause her to give you a source list and in addition, inform you about the in-house price estimate for that project. (Id.; tr. 79-86)
23. On 8 February 1996, the Government notified Mr. Schuepferling of the gratuities clause violation proceedings pursuant to FAR 52.203-3 which had been incorporated [\*13] into contract 0047 (stip. 88).



24. On 12 April 1996, the Army made its findings and recommendation in the gratuities clause violation proceedings and concluded that Mr. Schuepferling had violated the gratuity clause FAR 52.203-3 which had been incorporated into the contract (stip. 89; SSR4, tabs W, Y).
25. On 22 May 1996, the Deputy Assistant Secretary of the Army (Procurement), acting as the deciding official, concurred with the findings and recommendations and issued the Agency's final decision. Appellant was assessed exemplary damages under contract 0047 in the amount of DM 180,000.00 after said contract was terminated for default (stips. 90-91). As a set-off to these exemplary damages, the deciding official recognized the amount which had been withheld by the Government under contract 0047 (id.).

### **DECISION**

Appellant argues that the Government's motion to dismiss must be denied since the evidentiary record does not establish that bribery led either to the award of the contract to appellant or that it affected appellant's performance of the contract work. According to appellant, any payments which the Government alleges appellant made were not made to induce the Government [\*14] to do anything regarding this contract which the Government was not legally obligated to do; i.e., to award the contract to the lowest responsible, responsive bidder (appellant). Indeed, appellant contends that the evidentiary record only establishes that any payments made by appellant were extorted by Government employees and that appellant was not provided with any information to which it was not legally entitled to receive as a matter of right. Further, appellant contends that the Government relied on nothing said or done by appellant, other than appellant's offered price, in making the award. At best, the Government was only entitled to timely terminate the contract once alleged payments were known by the Government. In any case, the Government's failure to terminate the contract, notwithstanding its knowledge of the alleged fraudulent conduct, together with its continued demands for and acceptance of appellant's continued performance constitutes a ratification or affirmance of the contract by the Government thus negating any inherent Government right to avoid the contract. Appellant further points to the Government's allegedly contradictory reliance upon the Disputes and [\*15] Gratuity clauses in other, separate proceedings, as establishing the invalidity of the Government's position herein that contract 0047 was void ab initio.

Appellant's arguments are without merit. The operative facts in this case clearly and convincingly establish that appellant's Executive Manager/Owner, Mr. Schuepferling, paid the sum of at least DM 30,000.00 to Mrs. Flanery-Bateman, the Government's contract specialist assigned to the procurement action that resulted in the award of the instant contract to appellant, for the express purpose of bribing her to compromise the competitive bidding process with respect to subject contract (findings 1, 4-7, 13, 22). While providing Mr. Schuepferling with the "source list" was not per se a violation of applicable regulations (see FAR §§ 15.403, 14.205-5), it was in furtherance of a corrupt scheme in which he "contacted" the listed firms and then submitted by arrangement the low bid (finding 6). Moreover, providing the Government cost estimate to him, and not to other potential offerors, was a violation of FAR 15.413-1(b). Under these circumstances, we agree with the Government's contention that the contract was tainted by bribery [\*16] from its inception. See Schuepferling GmbH & Co., KG, ASBCA No. 45564, 23 March 1998, slip op. at 9-10 and cases cited therein. Since it is plain that the instant contract was obtained through appellant's bribery of Mrs. Flanery-Bateman, subject contract is void ab initio and cannot be ratified (id.). We have considered all of appellant's other arguments and have determined that they are devoid of merit.

The Government's motion to dismiss for lack of jurisdiction because the contract is void ab initio is granted. This appeal is dismissed with prejudice. Dated: 28 April 1998  
J. STUART GRUGGEL, JR. Administrative Judge Armed Services Board of Contract Appeals I concur  
MARK N. STEMLER Administrative Judge Acting Chairman Armed Services Board of Contract Appeals I concur  
MONROE E. FREEMAN, JR. Administrative Judge Acting Vice Chairman Armed Services Board of Contract Appeals.

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## **APPENDIX C. APPEALS OF ERWIN PFISTER GENERAL BAUUNTERNHMEN**

Appeals of -- Erwin Pfister General-Bauunternehmen ASBCA Nos. 43980, 43981, 45569, 45570 Armed Services Board of Contract Appeals 2001 ASBCA LEXIS 79; 2001-2 B.C.A. (CCH) P31,431 May 18, 2001 CONTRACT: [\*1] Contract Nos. DAJA04-90-C-0070, DAJA04-90-C-0042 JUDGES: J. STUART GRUGGEL, JR., Administrative Judge. MARK N. STEMLER, Administrative Judge, Acting Chairman, EUNICE W. THOMAS, Administrative Judge, Vice Chairman, concur. COUNSEL: APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq., Frankfurt, Germany.v APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA, Chief Trial Attorney, MAJ Michael J. O'Farrell, Jr., JA, CPT Gregg M. Schwind, JA, Trial Attorneys. OPINION BY: GRUGGEL, JR. OPINION: OPINION BY ADMINISTRATIVE JUDGE J. STUART GRUGGEL, JR. ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION. ASBCA Nos. 43980 and 45569 are appeals from a termination for default and constructive denials of certified claims for payment of invoices for work performed, Prompt Payment Act interest and additional work under Contract No. DAJA04-90-C-0070. ASBCA Nos. 43981 and 45570 are appeals from a termination for default and a constructive denial of certified claims for payment of invoices for work performed under Contract No. DAJA04-90-C-0042. The Government moves for dismissal based on lack of jurisdiction contending that the subject contracts were tainted by bribery in the inducement and therefore void ab initio [\*2] . Appellant's oppositions thereto denied, inter alia, that the contracts were either void ab initio or obtained through bribery and invoked its rights to hearings, pursuant to Board Rule 5(a), with respect to the facts it contended were relevant to the Government's motions. Said hearings thereon were subsequently held in Heidelberg, Germany. Both parties have fully supplemented the record with multiple document filings pursuant to Board Rule 4 together with trial exhibits (id.).

## FINDINGS OF FACT FOR PURPOSES OF THE MOTION BACKGROUND

- 1 (a). Solicitation No. DAJA04-89-R-0355, a Standard Form 1442, negotiated lump sum procurement for Project No. IG-B0135-4, the repair of sanitary rooms at Warner Barracks, Bamberg, Germany, was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany on 21 August 1989 (R4, tab 1 (ASBCA 43980, 45569)). Block 9 of the solicitation identified Ms. Derfuss (nee Mrs. Irene Gimpl), a RCO Fuerth contract specialist, as the point of contact to call for information relating thereto (id.). Appellant's proposal in response to the solicitation was signed and submitted by its owner, Erwin Pfister, on 20 September 1989 ( [\*3] id.). The sanitary rooms repair project was awarded to appellant as Contract No. DAJA04-90-C-0070 (contract 0070) on 25 January 1990 in the amount of DM 2,255,644.25 (id.; tr. 36). (b). Solicitation No. DAJA04-89-R-0113, a Standard Form 1442, negotiated lump sum procurement for Project No. 3T-00009-7P, the overall repair of Building 357, Pinder Barracks, Zirndorf, Germany, was issued by the RCO, Fuerth, Germany on 12 April 1989 (R4, tab 1 (ASBCA 43981, 45570)). Block 9 of the solicitation identified Ms. Derfuss as the point of contact to call for information relating thereto (id.). Appellant's proposal in response to the solicitation was signed and submitted by its owner, Erwin Pfister, on 10 May 1989 (id.). The repair of Building 357 project was awarded to appellant as Contract No. DAJA04-90-C-0042 (contract 0042) on 4 December 1989 in the amount of DM 2,052,080.00 (id; tr. 29).
2. Contracts 0070 and 0042 contain the following relevant clauses: FAR 52.202-1 DEFINITIONS-ALTERNATE I (APR 1984); FAR 52.203-1 OFFICIALS NOT TO BENEFIT (APR 1984); FAR 52.203-3 GRATUITIES (APR 1984); FAR 52.203-5 COVENANT AGAINST CONTINGENT FEES (APR 1984); USEUCOM SUPP. 52.225-9905 LAW [\*4] GOVERNING CONTRACTS (JAN 1986-E); FAR 52.203-7 ANTI-KICKBACK PROCEDURES (OCT 1988); FAR 52.233-1 DISPUTES (APR 1984); FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1 (ASBCA 43980, 45569), tab 1 (ASBCA 43981, 45570)).
3. During appellant's performance of contracts 0070 and 0042, Ms. Ella Snell was the Chief, RCO, Fuerth and had overall responsibility for the administration of said contracts (Snell Deposition at 5-14). Two of her employees (Ms. Fairchild and Mr. Storch) functioned as contracting officers with respect to said contracts during appellant's performance thereof (id., Fairchild Affidavit at 1, Storch Affidavit at 1). ASBCA Nos. 43980, 45569—PERFORMANCE
4. By letter dated 13 February 1990, the Government confirmed appellant's receipt of contract 0070 and notice to proceed and established a contract completion date of 30 July 1990 (R4, tab 3).
5. Contract Modification No. P00001 was executed by the parties on 24 July 1990. The completion date was extended to 31 October 1990 and the contract amount was increased by DM 121,490.00 from DM 2,255,644.25 to DM 2,377,134.25 (R4, tabs 10, 16).

6. On 28 September 1990, the Government executed bilateral [\*5] Modification No. P00002. The total amount of the contract increased by DM 180,091.16 from DM 2,377,134.25 to DM 2,557,225.41 and the contract completion date was extended to 31 January 1991 (R4, tabs 17, 21).
7. (a). By letter dated 28 February 1991, appellant received a notice of suspension from future contracting from the Department of Army, Headquarters, U. S. Army Europe and Seventh Army (R4, tab 73). Said suspension was “based on evidence that [Mr. Pfister] paid bribes to various employees of the United States in order to receive contracts from the United States” (id.). (b). Mr. Pfister testified, without corroboration, at the hearing that both Ms. Fairchild and Mr. Storch orally assured him that he would be paid for all work performed under contract 0070 (and contract 0042) regardless of whether he had either obtained said contracts by bribery or had been suspended from obtaining new U. S. Government contracts (tr. 47-53, 73-78). The evidentiary record herein does not contain any contemporaneous documentation of said oral assurances of payment and Ms. Snell, Ms. Fairchild and Mr. Storch deny that Mr. Pfister was given any such assurances by any of them or by any other Government [\*6] employee (tr. 71-72; Snell Dep. at 85-88; Fairchild Aff. at 1-2, Storch Aff. at 1-2). Mr. Pfister's testimony at the hearing regarding said oral assurances of payment appears to be the first time wherein he advanced this contention (tr. 71-78; Fairchild Aff. at 2, Storch Aff. at 2; Board files (ASBCA 43980, 43981, 45569, 45570), passim). Moreover, Mr. Pfister also admitted that he continued to perform work under contract 0070 (and contract 0042) on the advice of his attorney who represented him in criminal proceedings (described infra) because “this could only be to my [Mr. Pfister's] advantage” (tr. 73).
8. Bilateral contract Modification No. P00003, effective 18 April 1991, was issued on a no-cost basis and extended the contract completion date to 30 July 1991 (R4, tabs 26, 49; see Snell Dep. at 35-88).
9. Throughout the contract performance period, the Government made ten progress payments to appellant (i.e., payments on invoices dated 11 April 1990, 23 May 1990, 18 September 1990, 25 October 1990, 22 November 1990, 10 and 24 January 1991, 28 February 1991, 10 April 1991 and 8 May 1991) totaling DM 1,584,186.39 for work performed by appellant under contract 0070 [\*7] (tr. 36-38; R4, tabs 7-9, 11, 14, 18, 22, 24, 28, 32, 35, 38-40, 42-44, 46-47, 50-54). Appellant appears to have performed approximately 80 per cent of the work under the original contract by 8 May 1991 (R4, tab 51). The Government's last payment to appellant was made on 1 June 1991 (R4, tab 52).
10. On 7 June 1991, the contracting officer notified appellant that payment on appellant's 11th invoice in the amount of DM 161,105. 21 was being withheld based on preliminary findings of an ongoing investigation by the Government that contract 0070 “was awarded under circumstances which could be viewed as fraudulent or criminal in nature” (tr. 38-39; Fairchild Aff. at 2, Storch Aff. at 1-2; R4, tabs 53-54).

11. The Government issued a show cause notice to appellant on 20 June 1991 as appellant had stopped working on the contract. The notice stated that the Government was considering terminating the contract under the provisions of the Default clause (R4, tab 55).
12. Appellant responded to the Government's show cause notice by stating that it "discontinued work because the long overdue payments have not been received by our office by June 10, 1991" (R4, tab 56).
13. On 25 July 1991, the [\*8] contracting officer notified appellant that the Government was withholding payment of appellant's 12th invoice in the amount of DM 69,045.09 based on preliminary findings of an ongoing investigation by the Government that contract 0070 "was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 39; R4, tab 58).
14. The Government terminated contract 0070 for default pursuant to the Default clause on 27 August 1991 based on appellant's failure to continue performance under the contract, substantial evidence indicating fraud or similar impropriety occurring in the course of awarding the contract and admissions by appellant's owner that he had paid a bribe to Mrs. Gimpl for award of the contract to his firm (R4, tab 59).
15. Appellant appealed the contracting officer's final decision terminating contract 0070 for default on 3 January 1992 (R4, tab 62). The Board docketed the appeal as ASBCA No. 43980.
16. On 28 January 1992, appellant submitted its final invoice for payment of the sum of DM 485,872.82, the remaining contract balance amount and an invoice for DM 126,570.44 for alleged additional work (tr. 39-41; R4, tabs 63-64).
17. By letter dated [\*9] 15 May 1992, appellant submitted two certified claims representing DM 485,872.59[82], the final invoice for work performed under the original contract, as amended, and DM 126,570.44, representing alleged additional work performed under the contract. Appellant requested that the Government issue a final decision thereon. (Tr. 41-42; R4, tab 65)
18. By letter dated 15 May 1992, appellant submitted a certified claim for payment of the amounts invoiced in appellant's 11th invoice (DM 161,105.21) and appellant's 12th invoice (DM 69,045.09) totaling DM 230,150.30 (tr. 42-43; R4, tab 66; see findings 10, 13, supra).
19. On 11 January 1993, appellant appealed the constructive denial of its claims of DM 230,150.30 (invoices 11 and 12) and DM 612,443.26 (two invoices under the contract: the first was the final invoice amount for work performed under the contract and the second was an invoice for additional work allegedly performed under the contract), both dated 28 January 1992 (tr. 43; R4, tab 67; findings 16-18, supra). The appeal was docketed as ASBCA No. 45569. ASBCA Nos. 43981, 45570—PERFORMANCE

20. Throughout the performance of contract 0042 period, the Government made ten [\*10] progress payments to appellant (i.e., payments on invoices dated 8 and 30 March 1990, 8 May 1990, 6 and 18 June 1990, 5 July 1990, 14 August 1990, 8 and 25 October 1990 and 6 February 1991) for work invoiced in the amount of DM 1,846,872.72, less .5 per cent discount for payment within 20 days of receipt of appellant's invoice(s) (R4, tabs 2-6, 8-11, 15-16, 24). Appellant appears to have performed approximately 98 per cent of the work under the contract by 4 March 1991 (R4, tab 15). The Government's last payment to appellant for work performed pursuant to contract 0042 was made on 15 March 1991 (R4, tab 16).
21. Bilateral contract Modification No. P00001, for the performance of ceramic tiling and electrical system work, was executed on 20 December 1990 on a no-cost basis and extended the contract completion date from 10 September 1990 to 18 March 1991 (R4, tabs 7, 12).
22. By letter dated 28 February 1991, the Army notified appellant that it was suspended from future contracting with the Department of Army, Headquarters, U.S. Army Europe and Seventh Army (R4, tab 33). The suspension was based upon evidence that appellant paid bribes to various employees of the United States in [\*11] order to receive contracts from the United States (id.).
23. By letter dated 20 May 1991, the contracting officer notified appellant that the Government was withholding payment on appellant's 11th invoice (dated 4 March 1991) in the amount of DM 164,166.46 based on preliminary findings of an ongoing investigation by the United States Government that this contract was "awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 30-33; R4, tabs 17, 25; Fairchild Aff. at 1, Storch Aff. at 1-2). It was also noted that appellant's performance under contract 0042 had numerous deficiencies which were never corrected (id.).
24. By letter dated 23 July 1991, appellant submitted its final invoice for DM 104,510.96 (tr. 32; R4, tabs 18, 26). On 29 July 1991, the contracting officer responded to appellant's request for payment under its final invoice by stating that the Government was withholding payment thereon based on preliminary findings of an ongoing investigation by the United States Government that contract 0042 "was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 32-33; R4, tab 19).
25. On 7 October 1991, [\*12] the Government terminated contract 0042 under the Default clause (R4, tabs 20-21). The basis for the termination was substantial evidence indicating fraud or similar impropriety occurring during award of the contract and admissions by appellant's owner that he had paid a bribe in exchange for receiving the award of contract 0042 (id.).
26. Appellant appealed the contracting officer's final decision terminating contract 0042 for default on 3 January 1992 (R4, tab 22). The appeal was docketed as ASBCA No. 43981.



27. By letter 15 May 1992, appellant submitted two certified claims requesting a contracting officer's final decision. The first claim of DM 164,166.46 represented the unpaid amount of the 11th partial invoice dated 4 March 1991 and the second claim of DM 104,510.96 represented appellant's unpaid final invoice dated 23 July 1991 (tr. 34-35; R4, tabs 15, 18, 24, 26, 28).
28. On 11 January 1993, appellant filed a notice of appeal with the Board appealing the constructive denial of the claimed amounts of DM 164,166.46 and DM 104,510.96 (R4, tab 29). The Board docketed the appeal as ASBCA No. 45570. ASBCA Nos. 43980, 43981, 45569, 45570—BRIBERY.
29. In a series of statements, [\*13] given to the German Police at the “Nuernberg Criminal Directorate, K-42” on 2, 7 November 1990 and 18-19 December 1990, Mrs. Gimpl admitted that appellant's owner, Mr. Pfister, paid her bribes in the amounts of DM 40,000 for awarding contract 0070 to appellant and DM 40,000 for awarding contract 0042 to appellant (Supp. R4, tabs 8-10 (ASBCA 43980, 43981, 45569, 45570); R4, tab 31 (ASBCA 43981, 45570, tab 71 (ASBCAv43980, 45569))).
30. In a series of statements, given to the German Police at the “Nuernberg Criminal Directorate, K-42” on 12-14 and 17 December 1990, Mr. Erwin Pfister stated that he had paid Mrs. Gimpl bribes in the amounts of DM 67,700 for awarding contract 0070 to appellant and DM 41,050 for awarding contract 0042 to appellant (tr. 43-45, 61-68, 81; supp. R4, tabs 2-5 (ASBCA 43980, 43981, 45569, 45579); R4, tab 30 (ASBCA 43981, 45570), tab 70 (ASBCA 43980, 45569))). At trial, Mr. Pfister confirmed that he obtained the bidders lists for the procurements that led to the award of contracts 0070 and 0042 from Mrs. Gimpl in exchange for the payments of the aforesaid bribe amounts to her (tr. 45, 60-63).
31. A criminal judgment was entered against Irene Gimpl by the Nuernberg [\*14] District Court on 3 December 1991 for tax evasion and for accepting bribes from appellant's owner, Erwin Pfister, in connection with, inter alia, the award of contract 0070 and contract 0042 during late 1989-early 1990 (Supp. R4, tab 6 at 1-3 (ASBCA 43980, 43981, 45569, 45570); see R4, tab 32 at 1-2v (ASBCA 43981, 45570), tab 72 at 1-2 (ASBCA 43980, 45569))). The Court stated, in pertinent part: In return, [Mrs. Gimpl] made sure that all the named firms were included in the list of firms invited to bid, and that besides these enterprises only firms appeared on the list which had been explicitly identified by the entrepreneur. In all the named cases [Mrs. Gimpl] failed to post the solicitation on the bulletin board of her office, in order to prevent other firms from learning of and participating in the solicitation. Of the money received [she], in each case passed on partial amounts to individuals accused in different actions. (Id.) The Court found that Mrs. Gimpl: severely violated the obligations of her labor contract by manipulating the solicitations of the projects. The entrepreneur [in the case at hand] paying the bribe already knew his “competitors” through [Mrs. [\*15] Gimpl], and he was able to influence them, to make arrangements with them. By not posting the solicitation on the bulletin board of her office [she] made sure, that outsiders did not learn of the projects and consequently were not

- able to submit lower offers. . . . Usually an upper limit for the desired profit results from the fact that, with a high profit margin, the entrepreneur must expect to be too expensive and therefore not to be awarded the contract. In the cases concerned, this limitation did not exist since the entrepreneurs did not have to expect lower offers. As an additional item in the calculation, however, the bribe paid to the accused had to be considered. Both circumstances result in an increase of the offer price in comparison with an offer a firm could and would submit under a correct solicitation. (Supp. R4, tab 6 at 2-3 (ASBCA 43980, 43981, 45569, 45570))
32. On 2 April 1996, the District Court of Erlangen, Germany, entered a criminal judgment against appellant's owner, Erwin Pfister, imposing a (suspended) two-year sentence of imprisonment for, inter alia, paying bribes to Mrs. Gimpl in the amounts of DM 67,700 for the award of contract 0070 to appellant [\*16] and DM 41,050 for the award of contract 0042 to appellant (Supp. R4, tab 1 at 1-3, 5-6, 10-11 (ASBCA 43980, 43981, 45569, 45570)). The Court stated that in return for the received amounts of money Mrs. Gimpl, . . . in the case of the stated contracts which were to be awarded to the accused Pfister, only added such firms to the list of offerors, whose offer could not compete with the offers of the accused so that the accused would be awarded the respective contracts. (Id. at 5-6) Mr. Pfister testified, at trial, that he only agreed with bribery statements contained in said judgment "to get the sentence of two years probation" (tr. 57-59). ASBCA Nos. 43980, 43981, 45569, 45570--GRATUITIES PROCEEDINGS
  33. On 24 May 1995, the Government notified appellant of Gratuities clause violation proceedings to be held with respect to contracts 0070 and 0042 pursuant to FAR 52.203-3 (R4, tabs 34-35 (ASBCA 43981, 45570), tabs 74-75 (ASBCA 43980, 45569)).
  34. By letter dated 6 October 1995, it was recommended that the Army find that appellant had violated the Gratuities clause and terminate appellant's right to proceed under contracts 0070 and 0042 based upon appellant's payments of DM [\*17] 86,000 in gratuities to an employee of the U. S. Government in exchange for award of said contracts in violation of FAR 52.203-3. It was also recommended that exemplary damages in the amount of DM 498,827.72--more than three times the gratuities paid but less than ten times the gratuities paid--be assessed (R4, tab 38 (ASBCA 43981, 45570), tab 78 (ASBCA 43980, 45569)).
  35. A decision was rendered on 3 November 1995 by Mr. Kenneth J. Oscar, Deputy Assistant Secretary of the Army (Procurement) (SARDA) finding that Mr. Pfister's payments of DM 86,000 to Mrs. Gimpl for the award of contracts 0070 and 0042 violated the Gratuities clause (R4, tab 39 (ASBCA 43981, 45570), tab 79 (ASBCA 43980, 45569)). The decision directed, in accordance with FAR 52.203-3, the contracting officer to terminate appellant's right to proceed under contracts 0070 and 0042 (id.). Further, Mr. Oscar concurred with the hearing official's amount (DM 498,827.72) as exemplary damages (id.).

36. The contracting officer, by letter dated 20 March 1996, advised appellant that its right to proceed under contracts 0070 and 0042 was terminated in accordance with the Gratuities clause and the order of the Deputy Assistant [\*18] Secretary of the Army (Procurement) dated 3 November 1995. The termination notice also included the assessment of damages in the amount of DM 498,827.72 (R4, tab 40 (ASBCA 43981, 45570), tab 80 (ASBCA 43980, 45569)).

### **DECISION**

Appellant contends that the Government's motions to dismiss subject appeals must be denied because the evidence allegedly does not establish that bribery led to the award of the contracts to appellant. According to appellant, the payments made to Mrs. Gimpl by Mr. Pfister, on appellant's behalf, were not made to induce the Government to do anything regarding these contracts which the Government was not already legally obligated to do -- i.e., award the contracts involved herein to the lowest responsible, responsive bidder (appellant). Appellant asserts that it was not provided with any information which it was not independently entitled to receive as a matter of right. Appellant further contends that the Government relied on nothing done or said by appellant, other than appellant's offered price, in making the awards. At best, the Government was only entitled to timely terminate the contract(s) once the alleged bribes were known by the Government. The [\*19] Government's failure to timely terminate said contracts, notwithstanding its knowledge of the alleged bribery conduct, together with alleged continuing demands for and acceptance/encouragement of appellant's continued performance of work purportedly constitutes a ratification or affirmation of the contracts by the Government thus negating any inherent Government right to avoid the contract. Appellant further points to the Government's allegedly contradictory reliance upon inter alia the Gratuities clause in other, separate proceedings as establishing the invalidity of the Government's position herein that contracts 0070 and 0042 were void ab initio. Appellant's arguments herein duplicate the arguments made by the appellants in Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA P29,659 and Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 01-1 BCA P 31,264 and are equally without merit. Indeed, the RCO, Fuerth contract specialist (Mrs. Gimpl) involved herein also accepted bribes to similarly manipulate the award of the Government construction contract involved in the above cited Schuepferling decision. [\*20]

The operative facts herein clearly and convincingly establish that appellant 's owner, Mr. Pfister, paid a total of at least DM 80,000 to Mrs. Gimpl for the express purpose of bribing her to manipulate the competitive bidding process with respect to ensuring the award of contracts 0070 and 0042 to appellant (findings 1(a)-(b), 29-32). In return, Mrs. Gimpl provided Mr. Pfister with the bidders lists that contained only the identities of the firms he had designated to participate in the two procurements involved herein (findings 31-32). Mrs. Gimpl also prevented other potential contractors from learning of and participating in the two procurements involved herein by failing to post the solicitations on the bulletin board of her office (id.). These circumstance solidly establish the existence herein of a corrupt scheme involving Mr. Pfister and Mrs. Gimpl that fatally tainted contracts 0070 and 0042 from their respective inceptions. See Schuepferling, *supra* and cases cited therein; Schneider Haustechnik, *supra*. Since contracts 0070 and 0042 were obtained through appellant's bribery of Mrs. Gimpl, each of said contracts is void ab initio and cannot be ratified [\*21] (id.). This is due to the primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption (id.).

We have considered appellant's other arguments and have determined that they are devoid of merit.

The Government's motions to dismiss subject appeals because the contracts involved herein are void ab initio are granted. The appeals designated as ASBCA Nos. 43980, 43981, 45569 and 45570 are dismissed with prejudice. Dated: 18 May 2001 J. STUART GRUGGEL, JR. Administrative Judge Armed Services Board of Contract Appeals I concur MARK N. STEMLER Administrative Judge Acting Chairman Armed Services Board of Contract Appeals I concur EUNICE W. THOMAS Administrative Judge Vice Chairman Armed Services Board of Contract Appeals

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